TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 154.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ADAM SADEAU.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 7, 1907.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 154.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ADAM BADEAU.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error to circuit court	1	1
Clerk's certificate and return	2	1
Transcript from district court	3	2
Writ of error to district court	4	2
Summons	5	2
Complaint	6	3
Answer	8	4
Bill of exceptions	10	5
Testimony of Jonathan M. Wainwright	10	5
Government Exhibit No. 1, transcript from Treasury Department of Badeau account, etc	11	5
Government Exhibit No. 2, transcript from Treasury Department of Badeau account, etc	36	19
Defendant's Exhibit A, Consular Regulations, 1870	39	21
B, Consular Regulations, 1874	43	23
C, letter of John L. Cadwalader, Assistant Secretary of State, to William A. Dart, consul-general, Montreal, Canada, March 1, 1875	47	25
Testimony of John L. Cadwalader	48	26
J. C. Bancroft Davis	53	29
George Corsa	56	31
Defendant's Exhibit E, letter of Daniel Manning, Secretary of the Treasury, to Alexander & Green, November 1, 1886	56a	31
Testimony of Adam Badeau (recalled)	59	33

	Original.	Print.
Government Exhibit No. 3, lord mayor's warrant and consul-general's certificate	62	35
Government Exhibit No. 4, notary's protest and consul-general's certificate	64	36
Government Exhibit No. 5, commission and consul-general's certificate	69	39
Government Exhibit No. 6, commission of Adam Badeau as consul-general	74	42
Testimony of John Walker	80	45
Motions for verdict	85	48
Charge	89	51
Judgment	100	57
Citation	101	57
Assignment of errors	102	57
Joinder in error	103	58
Consent as to record	103	58
Hearing and submission	104	58
Opinion	105	59
Judgment	116	61
Assignment of errors	119	62
Joinder in error	121	62
Citation	123	63
Proof of service of citation	124	63

1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you between The United States of America, plaintiff, and Adam Badeau, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-seven, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 15th day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

TIMOTHY GRIFFITH,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred twenty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States of America, plaintiff in error, against Adam Badeau, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

(Indorsed:) U. S. Supreme Court. The United States, plaintiff in error, against Adam Badeau, defendant in error. Original writ of error. Stephen A. Walker, att'y for pl'ff in error.

Service of a copy of the within is admitted, this 15 Sept., 1887.

ALEXANDER & GREEN,
Att'ys for def't.

3 (Cover:) Circuit court of the United States for the southern district of New York. The United States of America, plaintiff in error, against Adam Badeau, defendant in error. Error Book. Stephen A. Walker, United States attorney, attorney for plaintiff in error; Alexander & Green, attorneys for defendant in error. Willsam C. Gulliver, Stephen G. Clarke, of counsel for defendant in error. United States circuit court. Filed May 31, 1887. Timothy Griffith, clerk.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States of the Southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiff, and Adam Badeau, defendant, a manifest error hath happened to the great damage of the said the United States of America, as by its complaint appear, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States, together with this writ, so that you may have the same at New York City on the first Monday of April, eighteen hundred and eighty-seven, in the said circuit court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 26th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

[L. S.] TIMOTHY GRIFFITH,
Clerk.

The foregoing writ is hereby allowed.

ADDISON BROWN.

5 United States district court, for the southern district of New York.

THE UNITED STATES OF AMERICA
against
ADAM BADEAU.
} Suit on Treasury transcript.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the United States attorney for said district within twenty days after the service of of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable Addison Brown, judge of the district court of

the United States, for the Southern district of New York, at the city of New York, this 11th day of December, in the year one thousand eight hundred and eighty-four.

[L. S.] SAML. H. LYMAN,
Clerk.

ELIHU ROOT,
United States attorney, office and post-office address,
U. S. Court and Post-Office Building,
Broadway and Park Row, New York.

6 United States district court, southern district of New York.

THE UNITED STATES
vs.
ADAM BADEAU. } Complaint.

The United States of America, by Elihu Root, its attorney for the above said district, complaining of the above-named defendant, alleges on information and belief:

I.

That the above-named defendent was duly appointed consul-general of the United States to act in that capacity at London, England.

II.

That afterwards the above-named defendant entered upon his duties as such consul-general aforesaid.

III.

That at sundry times, to wit, between the 1st day of July, 1870, and the 16th day of September, 1881, while acting as such consul-general aforesaid at London, England, the above-named defendent received from sundry persons sundry sums of money, amounting in the aggregate to $10,572.64, to the use of the above-named plaintiff.

That thereafter, and before this action, the plaintiff demanded payment thereof from the defendeant.

That the defendant has not paid the above-stated amount to the plaintiff, nor any part thereof.

7 Wherefore plaintiff demands judgment against the defendant for the sum of $10,572.64, with interest from September 16th, 1881, besides the cost of this action.

ELIHU ROOT,
U. S. Attorney.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

G. E. P. HOWARD, being duly sworn, deposes and says: That he is an assistant U. S. attorney, and has charge of the above-entitled cause; that he has read the foregoing complaint; that the same is true, of his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

G. E. P. HOWARD.

Sworn to before me this 11th day of December, 1884.

JOHN A. SHIELDS.
U. S. Commissioner, So. D. N. Y.

8 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA
against
ADAM BADEAU.

The defendant, answering the complaint, avers and alleges:

He admits that he was, on or about the 28th day of April, 1870, duly appointed consul-general of the United States at London, in the Kingdom of Great Britain; that he continued to perform the duties of said consul-general at London aforesaid until on or about the 16th day of September, 1881.

He further admits that he did, during the period aforesaid, while acting as consul-general aforesaid at London aforesaid, receive from sundry persons sundry sums of money to the use of the above-named plaintiff, amounting in the aggregate to more than the sum mentioned in the complaint, all of which sums so received to the use of the plaintiff have been duly and fully accounted for by him to the plaintiff, and all of which money so received to the use of the plaintiff was paid to the plaintiff before the commencement of this suit.

He further answers on information and belief that the said sum of ten thousand five hundred and seventy-two dollars and sixty-four cents represents sums of money received by him in various sums and at various times while he was acting as consul-general aforesaid at London aforesaid, as the compensation or fees of this defendant as a consular

9 officer for performing notarial services and other notarial acts and unofficial services, which compensation and fees by law, and the regulations prescribed pursuant to the statute in such case made and provided for the information and government of consular officers of the United States, are not, nor is any part thereof, official fees or compensation, but on the contrary thereof, all of the said compensation and fees represented by the said sum of $\$10{,}572\ \frac{64}{100}$, are personal fees and compensation, for none of which he is responsible to the plaintiff.

Wherefore, defendant prays to be dismissed hence with his costs.

ALEXANDER & GREEN,
Defendant's Attorneys, 120 *Broadway, New York City, N. Y.*

CITY AND COUNTY OF NEW YORK, *ss:*

Adam Badeau, being duly sworn, says: That he is the defendant named in the foregoing answer; that he has read the said answer, and the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ADAM BADEAU.

Sworn to before me this 31st day of January, 1885.

ALLAN MCCULLCH,
Notary Public (6), *N. Y. Co.*

10 United States district court, southern district of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
ADAM BADEAU, Defendant.

Bill of exceptions.

Afterwards, at the November term of the said court, in the year 1886, to wit, on the 16th day of November, 1886, before the said court came the said plaintiff, by Stephen A. Walker, its attorney, and the defendant Adam Badeau, by William C. Gulliver, attorney, and Stephen G. Clarke, of counsel; and a jury being then and there duly chosen and sworn to try the issues aforesaid, on the 18th day of November, 1886, by direction of the court, rendered their verdict for the defendant against the plaintiff.

The plaintiff, to maintain the issues on its part, called and examined Adam Badeau, who testified that a letter (contained in plaintiff's exhibit 1) addressed to him, dated May 28th, 1883, from the Treasury Department, purporting to be signed by the Comptroller or Assistant Comptroller of the Treasury, was received by him on or about that day.

Jonathan M. Wainright, being sworn on the part of the plaintiff, testified that he had calculated the interest on the sum of $10,572.64 from June 14th, 1883 to the present date, and that the total amount is $12,743.41.

11 Plaintiff then offered in evidence a transcript certificate dated Treasury Department, Register's Office, Washington, October 4th, 1884. The same was received and marked Government's Exhibit No. 1, to be read or referred to on any appeal.

U. S. district court, S. D. N. Y.

Government exhibit No. 1.

No. 94,212. (Form 7.)

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
December 13th, 1881.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their consul-general at London, commencing April 1st, 1881, and ending June 30th, 1881, and find him chargeable therein for the following, viz.:

To fees received by him for official services from April 1st, 1881, to June 30th, 1881, as per transcript of fee book herewith:		
Less $494.50 charged to J. Nunn	$12,692.76	
To fees for shipping and discharging seamen....	334.00	
		$13,026.76

To fees received by his agents during the fiscal year ending June 30th, '81, viz.:		
At Dover	$11.50	
" Ramsgate	2.00	
		$13.50
		$13,040.26

12 I also find him entitled to credit therein as follows, viz.:

By "salaries, consular service," 1881:	
For amount of his salary from May 1st, 1881, to June 30th, 1881, at the rate of $6,000 per annum	$1,005.50
By compensation of his agents	13.50
Leaving a balance due from him, the said Adam Badeau, unto the United States, of twelve thousand and twenty-one dollars and twenty-six cents, with which he is to be charged on account for 1881	12,021.26
	$13,040.26

Warrant and counter-warrant.

Let a warrant issue in favor of said Adam Badeau for the portion of his salary due for the within-named period, for $1,005.50, and to be covered into the Treasury as follows, viz., $1,005.50 on account of fees received by him during that period, as per his account, to go the credit of miscellaneous receipts.

As appears from the statement and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

I admit and certify the above balance of $12,021.26 due U. S. this 19th day of December, 1881.

WM. LAWRENCE,
Comptroller.
J. A. B.

To the REGISTER OF THE TREASURY.

[Form 8½.]

13 OFFICE OF THE FIFTH AUDITOR OF THE TREASURY.

Statement of differences.

Balanced by him, per his account	
Do. due from him, per within statement	$12,021.26
Difference	$12,021.26

Thus accounted for:

Deposit claimed with bankers	$10,212.61
Contingent expenses settled separately, no appr	977.65
Clerk-hire account settled separately *	500.00
Shipping and discharging seamen settled separately †	334.00
	$12,024.26
Deduct error in footing fee book May, 26th	3.00
Diff. as above	$12,021.26

COMPTROLLER'S OFFICE,
DIPLOMATIC AND CONSULAR DIVISION,
Dec. 19*th*, 1881.

JOS. AD. THOMSON.

* Allowed, Report, No. 93,215.
† " " " 92,214.

14 *Adam Badeau, U. S. Consul-General at London, in account with the United States.*

DR. CR.

To fees received by him for official services from April 1st, 1881, to June 30th, 1881, as per transcript of fee book herewith:			By salaries of United States Consuls, 1881:	
Less $494.50 charged to J. Nunn	$12,692.76		For amount of his salary from May 1st, 1881, to June 30th, 1881, at the rate of $6,000 per annum	$1,005.50
To fees for shipping and discharging seamen	334.00		By compensation of his agents	13.50
		$13,026.76	By balance due from him to the United States	12,021.26
To fees received by his agents during fiscal year ending June 30th, 188 , viz;				
At Dover	$11.50			
At Ramsgate	2.00			
		13.50		
To balance due to him from the United States				
		$13,040.26		$13,040.26

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE, *December* 13*th*, 1881.
JAMES REA.

FIRST COMPTROLLER'S OFFICE, —— 188 .
Examined by —— ——.

15 *The United States Government, in account with Adam Badeau, Consul-General at London.*

DR. CR.

1881.			1881.	
June 30. To part of rent of office and miscellaneous expenses for the quarter ending June 30th	$977.64.50		June 30. By amount of balance brought from salary and for %	$11,690.26
" " To clerk-hire	500.00		" " By balance due the United States on % of relief of seamen, and paid by separate draft to the Treasury £246 17 9	1,289.07
" " To balance due the United States for relief of seamen, paid by separate draft to bankers £246 17/9	1,289.07			
" " To balance due the United States on general % and paid to bankers £2,098 11 2	10,212.61.50			
	12,979.33.00			12,979.33

E. & O. E.
ADAM BADEAU, *Consul-General.*

16 TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, D. C., May 28th, 1883.

ADAM BADEAU, ESQ.,
U. S. Consul-General, Havana, Cuba:

SIR: I have to advise you that your final account, as late U. S. consul-general at London, for salary and fees from July 1, to September 16, 1881, at your post, from September 17, 1881, to September 25, 1881, while awaiting a conveyance to the United States, from October 5, 1881, to October 15, 1881, while making transit to the United States, also salary for 37 days additional, in the 2d quarter of 1870, while awaiting exequatur, has been reported to this office by the Fifth Auditor, and the findings of that office, found to be correct, are concurred in by this office.

Your claim to have refunded and credited to you the sum of $10,557 as notarial fees, has been carefully considered, and is disallowed; since by the well-settled construction of the law and consular regulations, and the practice of the accounting officers of the Department, during the whole of the period of time covered by your claim, fees of the nature and kind embraced in your statement of notarial or unofficial fees, were regarded as official fees, and invariably charged as such to U. S. consular officers.

By the settlement of your account, as made by the Auditor, and concurred in by this office, you are a debtor to the United States on account of official fees received by you up to September 16, 1881	$9,713.50
You are also a debtor on account of relief of seamen to Sept. 16, 1881, as already advised	859.14
Total balance due from you	$10,572.64
Balance per your account	0.00
Difference against you	$10,572.64

17 Arising thus:

1. Claim for notarial or unofficial fees, as late consul-general at London, disallowed, as above stated		$10,557.00
2. One day's overcharge for salary, while awaiting exequatur, in 1879	$19.47	
Less overcredit of tax on salary	.83	
		18.64
		$10,575.64
From which deduct:		
Error in footing fees, 2d quarter, 1881		3.00
Difference as above stated		$10,572.64

Be pleased to take the necessary steps for closing your accounts, as late U. S. consul-general at London, by depositing with the Treasurer of the

United States, or with the assistant U. S. treasurer at New York, the following amounts:

On account of consular fees, 1882	$9,713.50
On account for relief of seamen	859.14
	$10,572.64

Please note the deposits as on your accounts as late U. S. consul-general at London, and transmit the original certificates of deposit to this office.

I am, very respectfully,

WM. LAWRENCE,
Comptroller,
By JOS. AD. THOMSON,
Acting Deputy Comptroller.

18 No. 98164.

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
April 16th, 1883.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their late consul-general at London, England, for 1871 and prior years, and find him entitled to credit thereon for the following, viz:

By balance due to him per Report No. 67575, and Register's certificate herewith	$2.00
By warrants in favor of the Treasurer, per said certificate:	
For No. 472, dated January 17th, 1872	623.57
By salaries of United States consuls, 1871 and prior years:	
For amount of his salary for 37 days, while awaiting his exequatur, per State Department's letter of January 16th, 1883, herewith	762.37
	$1,387.94

I also find him chargeable thereon for the following, viz:

To balance due from him per Report No. 67370, and Register's certificate herewith	$597.29
To warrant on the Treasurer, per Register's certificate:	
For No. 2145, dated December 23d, 1871	28.28
To tax on salary	33.05
Leaving a balance due from the United States unto him, the said Adam Badeau, of seven hundred and twenty-nine $\frac{32}{100}$ dollars, with which he is to be credited on account for 1871 and prior years	729.32
	$1,387.94

19 As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Auditor.

To the COMPTROLLER OF THE TREASURY OF THE UNITED STATES.

16 TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, D. C., May 28th, 1883.

ADAM BADEAU, ESQ.,
U. S. Consul-General, Havana, Cuba:

SIR: I have to advise you that your final account, as late U. S. consul-general at London, for salary and fees from July 1, to September 16, 1881, at your post, from September 17, 1881, to September 25, 1881, while awaiting a conveyance to the United States, from October 5, 1881, to October 15, 1881, while making transit to the United States, also salary for 37 days additional, in the 2d quarter of 1870, while awaiting exequatur, has been reported to this office by the Fifth Auditor, and the findings of that office, found to be correct, are concurred in by this office.

Your claim to have refunded and credited to you the sum of $10,557 as notarial fees, has been carefully considered, and is disallowed; since by the well-settled construction of the law and consular regulations, and the practice of the accounting officers of the Department, during the whole of the period of time covered by your claim, fees of the nature and kind embraced in your statement of notarial or unofficial fees, were regarded as official fees, and invariably charged as such to U. S. consular officers.

By the settlement of your account, as made by the Auditor, and concurred in by this office, you are a debtor to the United States on account of official fees received by you up to September 16, 1881	$9,713.50
You are also a debtor on account of relief of seamen to Sept. 16, 1881, as already advised	859.14
Total balance due from you	$10,572.64
Balance per your account	0.00
Difference against you	$10,572.64

17 Arising thus:

1. Claim for notarial or unofficial fees, as late consul-general at London, disallowed, as above stated		$10,557.00
2. One day's overcharge for salary, while awaiting exequatur, in 1879	$19.47	
Less overcredit of tax on salary	.83	
		18.64
		$10,575.64
From which deduct: Error in footing fees, 2d quarter, 1881		3.00
Difference as above stated		$10,572.64

Be pleased to take the necessary steps for closing your accounts, as late U. S. consul-general at London, by depositing with the Treasurer of the

United States, or with the assistant U. S. treasurer at New York, the following amounts:

On account of consular fees, 1882	$9,713.50
On account for relief of seamen	859.14
	$10,572.64

Please note the deposits as on your accounts as late U. S. consul-general at London, and transmit the original certificates of deposit to this office.

I am, very respectfully,

WM. LAWRENCE,
Comptroller,
By JOS. AD. THOMSON,
Acting Deputy Comptroller.

18 No. 98164.

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
April 16th, 1883.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their late consul-general at London, England, for 1871 and prior years, and find him entitled to credit thereon for the following, viz:

By balance due to him per Report No. 67575, and Register's certificate herewith	$2.00
By warrants in favor of the Treasurer, per said certificate:	
For No. 472, dated January 17th, 1872	623.57
By salaries of United States consuls, 1871 and prior years:	
For amount of his salary for 37 days, while awaiting his exequatur, per State Department's letter of January 16th, 1883, herewith	762.37
	$1,387.94

I also find him chargeable thereon for the following, viz:

To balance due from him per Report No. 67370, and Register's certificate herewith	$597.29
To warrant on the Treasurer, per Register's certificate:	
For No. 2145, dated December 23d, 1871	28.28
To tax on salary	33.05
Leaving a balance due from the United States unto him, the said Adam Badeau, of seven hundred and twenty-nine $\frac{32}{100}$ dollars, with which he is to be credited on account for 1871 and prior years	729.32
	$1,387.94

19 As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Auditor.

To the COMPTROLLER OF THE TREASURY OF THE UNITED STATES.

COMPTROLLER'S OFFICE.

I admit and certify the above balance of $729.32 due from United States this 22d day of March, 1884.

J. TARBELL,
Acting Comptroller.
J. R. G.

To the REGISTER OF THE TREASURY.

[Form 8¼.]

OFFICE OF THE FIFTH AUDITOR OF THE TREASURY.

Statement of Differences.

Balance claimed by him, per his account	$747.96
Do. due to him, per within statement	729.32
Difference	$18.64
Thus accounted for:	
1. Overcharge for salary	$19.47
Less: 1. Over-credit for tax on salary	83
Explained difference	$18.64

NOTE.—Consul was allowed salary while receiving instructions, per Report No. 65013, from April 28th, 1870, to May 18th, 1870, inclusive. His transit for 11 days would be from May 19th to May 29th, 1870, inclusive, May 30th, 1870, to July 5th, 1870, awaiting exequatur, would be 37 days only instead of 38 days, as charged by him.

COMPTROLLER'S OFFICE,
March 22d, 1884.

J. R. GARRISON.

20 *Adam Badeau, late U. S. Consul-General at London, in account with the United States.*

DR.		CR.	
To balance due from him per report No. 67370, and Register's certificate herewith	$597.29	By balance due to him per report No. 67575, and Register's certificate herewith	$2.00
To warrants on the Treasurer, per said certificate:		By warrants in favor of the Treasurer, per said certificate:	
For No. 2145, dated December 23d, 1871	28.28	For No. 472, dated January 17th, 1872	623.57
To tax on salary	33.05	By salaries of United consuls, 1871 and prior years:	
To balance due to him from the United States	729.32	For amount of his salary for 37 days, while awaiting his exequatur per State Department letter of January 16th, 1883, herewith	762.37
	$1,387.94		$1,387.94

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE. *April 16th*, 1883.
THOMAS I. GANT.

FIRST COMPTROLLER'S OFFICE, *March* 22*d*, 1884.
Examined by
J. R. GARRISON.

21 *The United States in account with Adam Badeau, late Consul-General at London.*

Dr.			Cr.	
1870.				
July 5.	To amount of salary due from May 29th to July 5th, 1870, not heretofore charged, being for time occupied awaiting exequatur, after arrival in London and prior to receipt of commission, 38 days at $7,500 per annum. (See letter of transmittal herewith):		By amount due United States as tax on salary, being 5 per cent. on amount in excess of $1,000 per annum	$33.88
	From May 29th to June 30th—33 days, 2d qr. '70	$679.94	By balance due from United States, carried to general account	747.96
	From July 1st to July 5th—5 days, 3d qr., '70	101.90		
		$781.84		781.84

E. and O. E.

HAVANA, CUBA, *December 14th*, 1882.
ADAM BADEAU,
Late Consul-General.

22 DEPARTMENT OF STATE,
Washington, Jany. 16th, 1883.

D. S. ALEXANDER, Esquire,
Fifth Auditor, Treasury Department:

SIR: In reply to your letter of the 2d instant I have to inform you that Mr. Adam Badeau, late consul-general at London, is entitled to compensation while awaiting exequatur from May 29th, 1870, to July 5th, 1870, in addition to the allowance already granted him on this account.

I am, sir, your obedient servant,

JOHN DAVIS,
Assistant Secretary.

No. 98163. (Form 7.)

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
April 16th, 1883.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their late consul-general at London, England, commencing July 1st, 1881, and ending October 15th, 1881, and find him chargeable therein for the following, viz:

To fees received by him for official services from July 1st, 1881, to September 16th, 1881, as per transcript of Fee Book herewith		$13,744.56
To fees received at the consular agency at Ramsgate, from July 1st, 1881, to September 16th, 1881	$0.00	
To fees received at the consular agency at Dover, from July 1st, 1881, to September 16th, 1881	9.38	
		9.38
		$13,753.94

23 I also find him entitled to credit therein as follows, viz.:

By warrant in favor of the Treasury, per said certificate:

For No. 573, dated February 21st, 1883		$281.50
" " 769, " " 23d, 1883		423.92
By amount with which he is now to be charged on his account for 1871 and prior years		729.32
By amount with which he is now to be charged on his account for 1881		3.02
By "Salaries, consular service," 1882:		
For amount of his salary from July 1st, 1881, to September 16th, 1881, at the rate of $6,000 per annum, while at his post	$1,271.73	
For amount of his salary from September 17th, 1881, to September 25th, 1881, while necessarily detained at his post awaiting a conveyance..	146.73	
For amount of his salary from October 5th, 1881, to October 15th, 1881, while in transit to his place of residence in the United States	179.35	
		1,597.81
By compensation of consular agents from July 1st, 1881, to September 16th, 1881, as follows:		
At Ramsgate	$0.00	
At Dover	9.38	
		9.38
Leaving a balance due from him, the said Adam Badeau, unto the United States of ten thousand seven hundred and eight and $\frac{99}{100}$ dollars, with which he is to be charged on account for 1882		10,708.99
		$13,753.94

24 *Warrant and counter-warrant.*

Let a warrant issue in favor of the said Adam Badeau for the portion of his salary due for the within-named period, for ($1,597.81), and to be covered into the Treasury as follows, viz., ($1,597.81) on account of fees received by him during said period, as per his account, to go to the credit of miscellaneous receipts—$2,327.13.

As appears from the statement and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

Balance per Auditor's report, brought forward	$10,708.99
From which deduct per Comptroller's amended statement...	433.61
Corrected balance due to the United States	$10,275.38

I admit and certify the above corrected balance of $10,275.38 due to United States this 22d day of March, 1884, with which the said Adam Badeau is to be charged on account for 1882. Let warrant and counter-warrant issue for $2,327.13 (instead of $1,597.81, as above directed), payable out of the following appropriations:

"Salaries consular service," 1881 and prior years	$729.32
"Salaries consular service," 1882	1,597.81

J. TARBELL,
Acting Comptroller.
J. R. G.

25

COMPTROLLER'S OFFICE,
August 14th, 1884.

Pay above warrant for $2,327.13 out of the appropriation for "Salaries consular service," 1881 and prior years, $729.32, and out of the appropriations for "Salaries consular services," 1882, $1,597.81, as per deficiency appropriation act, approved July 7th, 1884.

WM. LAWRENCE,
Comptroller.

By Z. M. LAWRENCE,
Acting Deputy Comptroller.

To the REGISTER OF THE TREASURY.

26

[Form 8¼.]

OFFICE OF THE FIFTH AUDITOR OF THE TREASURY.

Statement of differences.

Balanced by him, per his account		
" due from him, per within statement		$10,275.38
Difference		$10,275.38
Thus accounted for:		
1. Overcharge for salary while awaiting his exequatur	$19.47	
Less overcredit for tax on salary while awaiting his exequatur	.83	
		$18.64
2. Charge for notarial fees received and deposited by him from July 26th, 1870, to Sept. 10th, 1875, not allowed		10,557.00
3. Contingent expenses settled separately		*561.88
		$11,137.52

Less:

1. Amounts erroneously brought from relief account:		
(*a*) Balance admitted from July 1/81, to Sept. 16/81	$771.55	
(*b*) Error in account to June 30th, 1881	87.59	
	$859.14	
2. Error of consul-general in footing fee-book, May 26th, 1881	3.00	
		862.14
Explained difference		$10,275.38

COMPTROLLER'S OFFICE,
March 22d, 1884.

J. R. GARRISON.

27 *Adam Badeau, U. S., late consul-general at London, in account with the United States.*

DR.			CR.	
To fees received by him for official services from July 1st, 1881, to September 16th, 1881, as per transcript of fee-book herewith		$13,744.56	By amount with which he is now to be charged on his account for 1871, and prior years	$729.32
To fees received at the consular agency at Ramsgate, from July 1st, 1881, to September 16th, 1881	$0.00		By warrants in favor of the Treasurer, per said certificate:	
To fees received at the consular agency at Dover, from July 1st, 1881, to September 16th, 1881	9.38		For No. 573, dated February 21st, 1883	281.50
		9.38	For No. 769, dated February 23d, 1883	423.92
To balance due to him from the United States			For No. 1242, dated March 12th, 1883	433.61
			By amount with which he is now to be charged on his account for 1881	3.02
			By salaries of United States consuls, 1882:	
			For amount of his salary from July 1st, 1881, to September 16th, 1881, at the rate of $6,000 per annum, at his post of duty	$1,271.73
			For amount of his salary from September 17th, 1881, to September 25th 1881, while necessarily detained at his post awaiting a conveyance to the United States	146.73
			For amount of salary from October 5th, 1881, to October 15th, 1881, while in transit to the United States	179.35
				1,597.81
			By compensation of consular agents, from July 1st, 1881, to September 16, 1881, as follows:	
			At Ramsgate	0.00
			" Dover	9.38
				9.38
			By balance due from him to the United States	10,275.38
		$13,753.94		$13,753.94

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE, *April 16th*, 1883.

THOMAS I. GANT.

FIRST COMPTROLLER'S OFFICE, *March 22d*, 1884.

Examined by
J. R. GARRISON.

*All'd per Report No. 97696, but awaiting deficiency appropriation.

28 *United States in account with Adam Badeau, late consul-general at London. Final general account.*

Dr.		Cr.	
1881.			
Sept. 16. To amount of salary from July 1st to September 16th, 1881, at my post of duty	$1, 271. 73	By amount fees received from sundry persons from July 1st to September 16th, 1881, inclusive (as per statement of fees herewith)	$13, 463. 05
To part of rent of office and miscellaneous expenses from July 1st to September 16th, 1881, inclusive	561. 883	By error in account for relief of seamen to June 13th, 1881, as advised in letter to Comptroller of Treasury of January 20th, 1882	87. 59
To part of clerk hire—same period	423. 92	By balance due United States for relief of seamen from July 1st to September 16th, 1881, £158 10/11	771. 552
To compensation while awaiting exequatur not heretofore charged	747. 96		
To amount of notarial fees received from July 26th, '70, to September 10th, 1875, and erroneously returned by me as official fees and charged to me as such, as per detailed statement herewith	10, 557. 00		
To amount of my salary for 20 days while awaiting transportation and making transit from my post of duty to the United States, viz, from September 27th to October 16th, 1881, as per certificate herewith	326. 08		
To balance due the United States	433. 619		
(Paid by separate draft)	14, 322. 192		14, 322. 192

E. and O. E.

ADAM BADEAU,
Consul-General.

29 *The United States in account with Adam Badeau, late consul-general at London.*

Dr.		Cr.	
1881.		1881.	
Sept. 16. To amount of salary from July 1st to Sept. 16th, 1881, inclusive	$1, 271. 73	Sept. 16. By amount of fees received from sundry persons from July 1st to Sept. 16th, 1881, inclusive, as per statement of fees enclosed	$13, 463. 05
To balance due the United States and carried to general account and balance sheet	12, 191. 32		
	13, 463. 05		13, 463. 05

I certify that I have not been absent from the consulate-general during the time embraced in the foregoing statement.

ADAM BADEAU,
Late Consul-General.

30 *The United States in account with Adam Badeau, late consul-general at London.*

Dr. Cr.

1881.

Oct. 16. To amount of my salary while actually and necessarily occupied in awaiting for transportation and making transit from my post of duty to the United States—20 days, from Sept. 27th, 1881, to Oct. 16th, 1881, inclusive, as per certificate herewith $326.08

ADAM BADEAU,
Late Consul-General.

JAMAICA, LONG ISLAND,
July 16th, 1882.

No. 103,052. (Form 7.)

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
Sept. 3d, 1884.

Supplemental.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their late consul-general at London, Eng., commencing July 1st, 1881, and ending October 15th, 1881, and find him chargeable therein for the following, viz:

To balance due from him, per report No. 98,163, and register's certificate herewith	$10,275.38	
		10,275.38

31 I also find him entitled to credit therein as follows, viz:

By warrants in favor of the Treasurer, per said certificate: For No. 71, dated July 19th, 1884	561.88	
Leaving a balance due from him, the said Adam Badeau, unto the United States, of nine thousand seven hundred and thirteen and $\frac{50}{100}$ dollars, with which he is to be charged on account for 1882	9,713.50	
		$10,275.38

As appears from the statement and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

I admit and certify the above balance of $9,713.50 due U. S., this 4th day of September, 1884.

WM. LAWRENCE,
Comptroller.
By Z. M. LAWRENCE,
Actg. Depty. Comptroller.

To the REGISTER OF THE TREASURY.

32 [Form 8½.]

OFFICE OF THE FIFTH AUDITOR OF THE TREASURY.

Statement of differences.

Balanced by him, per his account	
Balance due from him, per within statement	$9,713.50
Difference	$9,713.50

Thus accounted for:

1. Overcharge for salary while awaiting his exequatur	$19.47	
Less over credit of tax on salary	.83	
		$18.64
2. Charge for fees which were received and deposited by him as official, from July 26th, 1870, to Sept. 10th, 1875, but claimed in his final account as notarial, disallowed since said fees were official under the regulations then in force, as fully set forth in correspondence herewith		10,557.00
		10,575.64

Deduct:

1. Amounts erroneously brought by him from account for relief of seamen, viz:		
(*a.*) Balance admitted from July 1st, 1881, to September 16th, 1881	$771.55	
(*b.*) Error in account, to June 30th, 1881	87.59	
	$859.14	
2. Consul-general's error in footing his fee transcript, May 26th, 1881	3.00	
		862.14
Explained difference		$9,713.50

COMPTROLLER'S OFFICE,
Sept. 4th, 1884.

J. R. GARRISON.

33 *Supplemental. Adam Badaea, U. S., late Consul-General at London, in account with the United States.*

DR.		CR.	
To balance due from him, per report No. 98,163, and Register's certificate herewith	$10,275.38	By warrants in favor of the Treasurer, per said certificate: For No. 71, dated July 29th, 1884	$561.88
		By balance due from him to the United States	9,713.50
	$10,275.38		$10,275.38

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE, *September 3d*, 1884.
E. T. BUSHNELL.

FIRST COMPTROLLER'S OFFICE,
September 4th, 1884.
Examined by
J. R. GARRISON.

34 TREASURY DEPARTMENT.

OFFICE OF THE SECRETARY OF THE TREASURY,
Division of Warrants, Estimates, and Appropriations,
Form 16.

MISCELLANEOUS REVENUE:
REVENUE COUNTER-
WARRANT.
No. 71.
3d quarter, 1884.
$561.88.

TO ADAM BADEAU, late United States consul-gen'l at London.

Pay to the TREASURER OF THE UNITED STATES, or order, five hundred and sixty-one dollars and eighty-eight cents, on account of the fees of your office, with which you are to be credited, received in the 3d quarter of 1881, to be credited into the Treasury as revenues derived from consular fees, pursuant to certificate of First Comptroller. No. 97,696, dated the 28th day of July, 1884, recorded by the Register; and for so doing this shall be your warrant.

Given under my hand and the seal of the Treasury Department this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of independence the one hundred and ninth.

[SEAL.]

W. T. M. L.

COON,
Act'g Secretary.

Sw. S.: 20.

WM. LAWRENCE,
First Comptroller.
By Z. M. LAWRENCE,
Act'g Dep'ty Compt.

REGISTERED:
C. M. L. 26.

H.

W. P. TITCOMB,
Act'g Register.

L.

Office of the
TREASURER OF THE UNITED STATES.

Received August 26th, 1884.

C.

A. U. WYMAN,
Treasurer.

Revenue counter.

Payment by diplomatic settlement warrant No. 2,002, of even date herewith.

Said Exhibit No. 1 also contains a list of several thousand charges at $2 each (with the exception of three charges at $1 each), the aggregate amount being $10,557 for alleged notarial fees for various services performed by the defendant as consular-general from July 27th, 1870, to September 10th, 1875, of which the following represent and include each and every different kind of acts for which said charges were made, viz:

35

No.	Name of party paying the fee.	Nature of service rendered.
54	John Coleman	Ack. power.
455	Walter Clarke	" will.
1096	W. H. Clark	" copy will.
1	Dr. P. B. Brunig	" codicil.
674	M. A. White	" citation.
3	Markeby & Daneson	" petition.
250	F. E. Bazelgette	" deed.

No.	Name of party paying the fee.	Nature of service rendered.
4	Simmonds, Hunt & Co	Ack. assignment.
2	Thos. Henderson	" mortgage.
3	Elizabeth Richardson	" conveyance.
3	Albert Thompson	" satisfaction.
3	Phœbe Cambreling	" release.
6	J. Jeffrey	" transfer.
3	J. Carey, jr	" lease.
593	L. Bamberger	" agreements.
890	Lawrence Bros	" affts.
1663	W. L. Schofield	" disclaimer.
640	Hy. A. Thomas	" revocation.
9	J. A. Richardson	" declaration.
1	T. Matthews	" receipt.
9	Thos. Barnard	" authority.
2	L. Bishop	" certificate of trust.
2	C. M. Mamgault	" power of atty.
2712	Van Duzer & Richards	" license.
2476	Whitehead & Palmer	" settlement.
426	P. S. Rodney	" proxy.
1022	A. M. Whistler	" summons.
8	F. M. Callard	" indemnity.
280	R. Woodcock	Auth. probate act.
7	H. M. Benedict	" copy of will.
730	P. Calhagoun	" power.
559	Guardian Insurance Co	" trust deed.
296	Andrew Mares	" affi.
496	H. G. Harper	" certificate.
758	Randall & Ward	" receipt.
860	Henry Birdshall	" assignment.
8	Nat'l Provincial B'k	" notarial act.
2041	Jas. B. Batten	" declaration.
3166	B. Morley Hart	" commission.
6	Sutton F. Cochran	" agreement.
8	J. Sullivan	" release.
2318	Morris Jones	" bond.
6	Knowles & Foster	" copy of certificate.
2149	G. B. Crawley	" notice.
6	A. Collie	" discharge.
2681	C. V. Graham	" petition.
8	Schulster, Son & Co	" account.
922	A. T. Stewart & Co	" judgment.
2617	A. M. Lea	" affirmation.

36 Plaintiff's Exhibit No. 2, duly certified copy of transcript certificate, Treasury Department, Register's Office, under the hand and seal of Chas. E. Coon, Acting Secretary of the Treasury, shows that there was due the plaintiff from the defendant January 12th, 1883, the sum of $859.14 on account of fund for "The relief and protection of American seamen." Any part of either exhibits one or two may be read or referred to on any appeal by either party, with like force and effect as though printed in full.

U. S. district court, S. D. N. Y.

Gov't Exhibit No. 2.

[James H. Fish, stenographer.]

No. 97,334. (Form 10*a*.)

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE,
Jan'y 2d, 1883.

I hereby certify that I have examined and adjusted an account between the United States and Adam Badeau, their late consul-general at London,

commencing 1st July, 1881, and ending 16th Sept., 1881, and find him chargeable thereon for the following, viz:

To amount to be credited to 1881	$87.59
To amount received by him as extra wages of discharged seamen	841.76
To amount received by him as hospital dues.....	144.36
	1,073.71

37 I also find him entitled to credit thereon as follows, viz:

By fund for the relief and protection of American seamen for 1882:

For the following sums paid by him for the relief of —— destitute American seamen during the above-named period, as per his account and vouchers herewith, viz:

For miscellaneous items	$24.57	
For wages and moneys refunded to seamen.....	190.00	
		214.57
Leaving a balance due the United States from the said consul of eight hundred fifty-nine and $\frac{14}{100}$ dollars.....		859.14
With which he is to be charged on his account for 188.....		
		1,073.71

As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

D. S. ALEXANDER,
Fifth Auditor.

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

I admit and certify the above balance of eight hundred and fifty-nine dollars and fourteen cents ($859.14) due to the United States this 12th day of January, 1883.

WM. LAWRENCE,
Comptroller.

To the REGISTER OF THE TREASURY.

38 *Adam Badeau, late United States consul-general at London, in account with said States.*

DR.		CR.	
To amount to be credited to 1881.....	$87.59	By fund for the relief and protection of destitute American seamen, 1882:	
To amount received by him as extra wages	841.76	For amount paid by him for the relief of destitute American seamen from 1st July, 1881, to 16th Sept., 1881, per his account and vouchers herewith, viz:	
To amount received by him as hospital dues	144.36	For miscellaneous items. $24.57	
To balance due.....		For wages and moneys refunded to seamen... 190.00	
			$214.57
		By balance due the United States.....	859.14
	1,073.71		1,073.71

TREASURY DEPARTMENT,
FIFTH AUDITOR'S OFFICE, *Jan'y* 2d, 1883.
F. E. HESLER.

(For statement of differences see first page.)
COMPTROLLER'S OFFICE, *Jan'y* 12th, 1883.
J. R. GARRISON.

39 [Form 10½ A.]

OFFICE OF THE FIFTH AUDITOR OF THE TREASURY.

Statement of differences.

Amount due U. S.	$859.14
Consul-general admits	771.55
Difference	87.59

Being: Error in figuring sterling as per Report 94,472.

NOTE.—Consul-general admits this amount in his salary account received in this office with this acc't. This account will be balanced by transfer from salary account when settled.—F. E. H.

COMPTROLLER'S OFFICE, *Jan'y 12th*, 1883.

J. R. GARRISON.

Plaintiff rests.

The defendant, further to maintain the issues on his part, offered in evidence the volume of consular regulations, dated October 1st, 1870, and it was marked Defendant's Exhibit A.

Mr. CLARKE. I will read only those parts of Exhibit A which are material to this controversy, as follows:

"EXECUTIVE MANSION,
"*Washington, October 1st*, 1870.

"In accordance with the provisions of the law the following regulations and instructions, including a tariff of fees to be charged for official services, are hereby prescribed for the information and government of consular officers of the United States.

"U. S. GRANT.

40 "DEPARTMENT OF STATE,
"*Washington, October 1st*, 1870.

"I transmit herewith, for your information and government, the accompanying regulation and instructions, which have been prescribed by the President.

"They are intended to supersede those which have been heretofore issued by this Department, including circulars, and are to be carefully observed in all respects.

"I am, sir, very respectfully, your obedient servant,

"HAMILTON FISH.

"To the several consular officers of the United States."

Paragraph 307–8, under the head of notarial acts, &c., are as follows:

"The act of 1856 (section 24) permits consular officers, whenever they are required, or deem it necessary or proper to do so, to administer to or take from any person an oath, affirmation, affidavit, or deposition; and also to perform any notarial act or acts such as any notary public is re-

quired or authorized by law to do or perform within the United States. Such acts, in order to be valid and effectual, must be certified by the consul under his hand and seal of office.

"308. The laws of some of the States and Territories of this Union authorize consular officers to take the acknowledgment of deeds, to take depositions, affidavits, &c., for use as evidence in such States and Territories respectively. When called upon for any service not within the usual functions and competence of a notary public, according to the general law and usage of commercial nations, the consul will be guided by the State or Territorial statute which empowers him to act in the
41 premises. It sometimes happens that he is called upon by a State or Territorial tribunal to execute a commission for taking testimony. In these cases he may expect to be furnished with specific instructions by the court under whose commission he is to act, and should conform thereto with the utmost strictness. This function is regarded as outside of the regular duties and responsibility of a consular officer. Where its exercise is offensive to the Government of the country in which the consul is located, he is recommended to procure the attestation of the judicial officer, who, by the local law, is competent to take and certify depositions, to be used in foreign courts, and to accompany the same with his own attestation in the manner required by the instructions of the tribunal, at whose instance he is called upon to act.

"It is to be understood that in such cases the consular officer does not act in his quality of an agent of the Federal Government, but simply as a citizen of the United States, whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual. He should make himself as useful as he can to his fellow-citizens, without giving offense to the Government which gives him his exequatur."

Mr. WALKER. I move to strike out all after the words "it sometimes happens," as irrelevant and immaterial.

Motion denied; counsel for the Government excepts.

Mr. CLARKE. I also read from Article XXII, paragraph 312, as follows:

"312. All acts are to be regarded as official services when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States."

42 Mr. WALKER. In this connection, if there is no objection, I will read from the same article paragraphs 320 and 323, which are as follows:

"320. The following is the revised tariff of fees, prescribed by order of the President, and to be observed by all consuls.

"323. Tariff of Fees. Acknowledgments.

1.	*	*	*	*	
2.	*	*	*	*	
3.	*	*	*	*	
4.	*	*	*	*	
5.	*	*	*	*	
6.	Of one or more persons to a deed or instrument of writing				$2.00
7.	Of one or more persons to a power of attorney.....				2.00

Mr. CLARKE. The tariff of the fees contains 110 different items under different headings. I desire them all to be considered as read in evidence; I will read the whole if the district attorney wishes.

Mr. WALKER. I would like to have you read No. 99.

Mr. CLARKE. I will read any one you want. 99 is as follows: "For administering oaths, not hereinbefore provided for, each, 50c."

No. 110 is under the head of "copies," for the first hundred words, fifty cents, and for every additional hundred words or less, fifteen cents." And at the bottom of the page in a foot note is the following:

"When parties have a right to call for copies, consular officers must make them at this rate. This does not, however, include authentication, if that is required. The fee for the 'copies' is not an official fee to be accounted for. The fee for authentication is an official fee."

(It is understood that the whole tariff of fees is regarded as read in
43 evidence, and either party may call the attention of the court or jury to any item upon it.)

The whole of said tariff of fees as above, or any part thereof, may be referred to or read by either party on any appeal, with like force and effect as though here printed in full.

Mr. CLARKE. I now offer in evidence the volume of consular regulations dated September 1st, 1874.

The volume is marked Defendent's Exhibit B.

Mr. CLARKE. I read from Exhibit B, as follows:

"EXECUTIVE MANSION,
"*Washington, September 1st*, 1874.

"In accordance with the provisions of law the following revised regulations and instructions, including a tariff of fees to be charged for official services, are hereby prescribed for the information and government of consular officers of the United States.

"U. S. GRANT.

"DEPARTMENT OF STATE,
"*Washington, September 1st*, 1874.

"I transmit herewith, for your information and government, the accompanying revised regulations and instructions, which have been prescribed by the President.

"They are intended to supersede those which have been heretofore issued by this Department, including 'circulars,' and are to be carefully observed in all respects.

"I am, sir, very respectfully, your obedient servant,

"HAMILTON FISH.

"To the several consular officers of the United States."

44 "*Notarial acts, &c.*

"308. The statute permits consular officers, whenever they are required, or deem it necessary or proper to do so, to administer to or take from any person an oath, affirmation, affidavit, or deposition, and also to perform any notarial act or acts, such as any notary public is required or

authorized by law to do or perform within the United States. Such acts, in order to be valid and effectual, must be certified by the consul under his hand and seal of office. It will therefore be necessary for a consul desiring to perform notarial acts to have a notarial seal, distinct from his consular seal. The Department does not furnish such seals.

"309. The laws of some of the States and Territories of this Union authorize consular officers to take the acknowledgment of deeds, to take depositions, affidavits, &c., for use as evidence in such States and Territories, respectively. When called upon for any service not within the usual functions and competence of a notary public, according to the general law and usage of commercial nations, the consul will be guided by the State or Territorial statute which empowers him to act in the premises.

"310. It sometimes happens that he is called upon by a State or Territorial tribunal to execute a commission for taking testimony. In these cases he may expect to be furnished with specific instructions by the court under whose commission he is to act, and should conform thereto with the utmost strictness."

Mr. WALKER. I make the same motion as to striking out all after the words "it sometimes happens" as to the previous extract from Exhibit A.

Motion denied; counsel for the Government excepts.

Mr. CLARKE. I read further from Exhibit B.

"311. This function is regarded as outside of the regular duties and responsibilities of a consular officer. Where its exercise is offensive to the Government of the country in which the consul is located, he is recommended to procure the attestation of the judicial officer, who, by the local law, is competent to take and certify depositions to be used in foreign courts, and to accompany the same with his own attestation in the manner required by the instructions of the tribunal at whose instance he is called upon to act.

"312. It is to be understood that in such cases the consular officer does not act in his quality of an agent of the Federal Government, but simply as a citizen of the United States whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual. He should make himself as useful as he can to his fellow-citizens without giving offense to the Government which gives him his exequatur. But it must be understood in all such cases that he acts as a private citizen, and that the Government can not in any way be made responsible for his acts. In order to make this perfectly clear the miscellaneous forms which have been sometimes heretofore furnished with the regulations for the use of consuls, will be omitted hereafter, leaving the consul to his own judgment in such matters."

Counsel for the Government moves to strike out section 312; motion denied; counsel for the Government excepts.

Mr. CLARKE. I read further.

"314. But no fee is to be charged for witnessing the execution and taking the acknowledgment of assignments or registered bonds or stocks of the United States, or of powers of attorney to assign such bonds or stocks, or to collect the interest thereon; it being apprehended by the Treasury Department that such charges might affect the value of our securities abroad.

"321. All acts are to be regarded as 'official services' when the consul is required to use his seal and title officially, or either of them;
46 and the fees received therefor are to be accounted for to the Treasury of the United States.

"330. The following is the revised tariff of fees, prescribed by order of the President, and to be observed by all consuls."

Mr. CLARKE. Paragraph 333 is a tariff of fees, embracing 107 items similar in character to the tariff in the regulations of 1870, and is to be regarded as read in evidence, and either party may call attention to any part of it, and any part thereof may be read on any appeal as if herein printed in full."

The district attorney asks me to read items 6 and 7, which are as follows:

"6. Of one or more persons to a deed or instrument of writing, $2.00.

"7. Of one or more persons to a power of attorney, $2.00," under the head of "acknowledgments."

Mr. Clarke, in behalf of the defendant, offered in evidence a certified copy of a letter from the Department of State addressed to William A. Dart, consul-general at Montreal, dated March 1st, 1875.

Mr. WALKER. I object to this letter as incompetent, irrelevant, and immaterial, and as not on its face cotemporaneous.

The COURT. I think I am obliged to receive this letter for what it is worth.

(Counsel for the Government excepts on all the grounds stated in his objection.)

The letter is marked defendant's Exhibit C, and is read in evidence by defendant's counsel as follows:

47 No. 357. DEPARTMENT OF STATE,
Washington, March 1st, 1875.

WILLIAM A. DART, Esquire,
Consul-General of the United States, Montreal:

SIR: Your No. 309, asking information in regard to the performance of notarial acts and the disposition of the fees received therefor has been received. You state that you have heretofore regarded services in taking affidavits and acknowledgments as official services, the fees for which should be credited to the Government, and that you are unable to understand how proper certificates can be annexed under paragraph 895 of the regulations, except by describing yourself in your consular capacity.

You also refer to the form of seal contemplated in paragraphs 308 and 309.

In reply I have to inform you that in the opinion of the Department all fees which are received by you for notarial services or for services rendered in taking acknowledgements of deeds may be retained by the consular officer as fees received for unofficial services, and need not be accounted for to the Treasury, provided the services are those rendered properly and purely as notary or commissioner unconnected with other consular services and where the taking of the affidavit or acknowledgment is not a part of an official consular duty contemplated or required by the consular regulations. The consul no doubt must in performing such duty describe himself as consul in the attestation. Paragraphs 308 and 309,

in relation to a seal, simply contemplate some form of consular seal which, while having a similar designation upon it, may be distinguishable from the seal which is used in other official transactions.

I am, sir, your obedient servant,

JOHN L. CADWALADER,
Assistant Secretary.

48 JOHN L. CADWALADER, being duly sworn and examined as a witness for the defendant, testified:

I was connected with the State Department of the United States; was the Assistant Secretary from the 1st of July, 1874, until the spring, April, I think, of 1877; so far as the consuls of the United States were concerned all the correspondence with consular officers was carried on with the Assistant Secretary or some other Assistant Secretary; that is, the consuls were divided, certain countries corresponded with one secretary and certain with another.

Q. Will you look at Exhibit C, which purports to be a copy of a letter dated March 1st, 1875, to William A. Dart, esq., consul-general of the United States at Montreal; and I ask you whether you recognize that as a copy of any letter which you wrote while Assistant Secretary of State?

A. (Reading the letter.) I remember an instance in which Mr. Dart about this time asked for some instructions, and I wrote a letter of this general context; and I have no doubt this is the letter giving those instructions.

Q. Will you look at paragraph 308 of article 21 of the consular regulations of 1874, and say whether that paragraph was construed by the Department of State during your term of office, so far as it relates to notarial acts?

A. Yes, constantly.

Q. What was the construction put by the State Department upon the meaning of the words "notarial act or acts," as contained in that paragraph of article 21, to which I have called your attention?

Mr. WALKER. I object to the question. The construction of the Department of State must be proved in another way. Acts of the State Department are not personal acts, but must be authenticated. The only method of proving a construction by the State Department of a statute is by proving the acts of the Department under such statute. I object to the question as incompetent and immaterial, and also as calling for a

49 conclusion of law on the part of the witness as to what is the result of certain series of official acts in his opinion.

(Objection overruled; exception.)

A. I must answer by saying that unless you shall fix the particular act done or particular act in question, it is rather difficult to lay down a general rule; so far as affidavits or acknowledgments are concerned, or services of that character, there was a very distinct rule laid down and a very distinct practice; but I can imagine a notarial service which could be official, and there certainly were both notarial services unofficial and notarial services that might be official; now, therefore, section 308 refers to both those kinds of services; where, however, the word "permits" is used, that, of course, refers to unofficial services.

By Mr. WALKER.

Q. You are now stating the construction of the State Department?

A. I am; and stating what was the fixed construction of this section at the time I went into office.

Q. Evidenced by questions that arose not infrequently on these subjects?

A. Evidenced by questions that arose not infrequently on these subjects.

Q. In the form of interrogatories by consuls and replies by the State Department?

A. They might have been; and in some instances they were verbal complaints by persons; in other instances questions would arise in different ways; it would be quite impossible to say how everyone of these cases arose, or to give the history which really brought out the development or the practice of the rule laid down; if you therefore ask me if there was a construction of section 308, I can say, yes, a variety of construction; but it would depend on the character of the act or character of the document as to what sort of service that was construed to be.

Q. There have been a variety of constructions, as I understand, placed by the State Department upon section 308?

50 A. No; there have been a variety of constructions under different peculiar conditions presented; if I may illustrate; a consul had certain duties that he was required to perform, which were his first duties to perform; if, however, either his time allowed, or the possibility was open to him of doing unofficial acts, the Department encouraged the performance of those acts; in fact, he was expected, in reason, to do unofficial acts that were reasonably within his power; now, if the law of a foreign country permitted him to take a deposition, or to present a promissory note as a notary—if that were permitted—the State Department had no objection, and of course his services in that respect was unofficial; so that I answer by saying that the section was construed as depending on the character of the act presented, that if it were the acknowledgment of a deed, if it were an affidavit in private matter, if it were certifying to the correctness of a copy of a will—all of which were absolutely private matters, entirely disconnected with the Government, and which, as consul, he was not compelled to perform—those services were absolutely unofficial, the pay for which he was entitled to retain. Section 321 seems to draw a distinction between official and unofficial acts; and where the consul acts as consul, either under international law or by virtue of his appointment, in matters he is compelled to perform, these are official acts; in matters where he acts as a friend of a countryman whom he is obliging, or for whom he does some official service, that is not an official act.

Q. Where the consul acted under authority derived from the laws of different States, was any construction put by the Department upon such act during your term of office?

A. There was.

Q. What was the construction put upon such acts?

(Objected to by Mr. Walker as incompetent, irrelevant, and immaterial; objection overruled; exception.)

51 A. The Department had before them and did consider the question whether such acts were official or unofficial, on more than one occasion; I mean acts of consuls taking acknowledgements and

in acting as commissioner under the laws of the various States; and when I use the words "official" and "unofficial" I mean whether they were acts for which the fees should be paid into the Treasury, or acts for which the consul was entitled to retain the fees; the construction was that acts of that character were unofficial acts, precisely as if the consul had executed a deposition under an order of the court, or with authority given him by the court by taking testimony in a patent case, if the laws of the Government allowed such testimony to be taken before a consul.

Cross-examined by Mr. WALKER:

I stated, as I remember, that section 321, which contains these words, "All acts are to be regarded as official services when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States," was construed by the State Department as intended to lay down what are official acts and what are not.

Q. And the State Department construed it that whenever a consul had to use his official seal or his official title that was an official service, did they not?

A. Oh, I think not.

Q. Then will you tell me how they did construe section 321; will you tell me what the State Department defined to be official services in section 321?

A. I think I have said, and if not, I do say, that it is impossible to lay down a rule as to what is an official service by any general statement; and the only manner which I know is to say what the act performed is, and then judge in that respect.

Q. Didn't the State Department attempt to lay down a specific rule in reference to that, as to what are official acts and what are not under section 321?

52 A. The State Department certainly did, in section 321, lay down the rule that where a consul was required to perform an act and to use his seal—and I add, not in the regulations, "in the course of his duty as consul"—that that was an official act.

Q. (By counsel for defendant). You added, "in the course of his duty as consul;" does that appear in section 321?

A. No, I say I added that.

Q. Does the interpretation of the State Department involve or imply the addition of the words, "in the course of his duty?"

A. I think so, for this reason: That the use of the word "required" I think was purposely inserted in those regulations to draw a distinction between acts which the consul might decline and acts which the consul was required to perform; I think that the State Department interpreted the words "when the consul is required to use his seal and title officially" to mean official obligation on the part of the consul to do the act; that was passed upon on a variety of occasions; that interpretation was uniform so far as I know.

Q. Can you state any case in which that interpretation of the words "is required" is given?

A. I can not.

Q. You can refer to no particular consul where that interpretation which you have now given to the expression "is required" is given?

A. I am inclined to think some such thing arose on this very subject.

Q. Mr. Badeau, you mean?

A. No; I mean of taking acknowledgments, in the matter of complaint as to a consul's charges in performing this duty; I am quite sure that there was complaint made of charges by consuls for the performance of this duty; and the ruling and reply was that it was a matter purely between the individual who employed the consul and the consul, or between the consul and the State which permitted him to act; I will not say it was dependent on that section; but I think that section and those words had some part in that interpretation.

If you will allow me to add, that in construing the section, of
53 course, I am speaking of the whole section, and not simply of the word "required," but also the word "officially" is to be taken into consideration in reaching a construction on that section; I don't wish to be understood for a moment as putting my construction of this section solely on the word "required;" I put it quite as much on the word "officially."

Q. The section professes to define what are official services, does it not?

A. The section, as I understand it, professes to say that whenever a service is official, the fee for that service goes in the Treasury.

Q. That is the interpretation put upon it by the State Department, is it?

A. Of course so; but I don't understand this section presumes to lay down a rule in every case to be followed as to what particular service is official.

Q. Will you refer to section 308, and state to me what the official interpretation of the State Department was as to the last sentence of that, the last two sentences; "It will therefore be necessary for a consul desiring to perform notarial acts to have a notarial seal, distinct from his consular seal. The Department does not furnish such seals;" was there any interpretation not obvious given by the State Department to that clause or either of them?

A. The clause practically is a direction, as far as I understand it, a direction to consuls; I am not aware that any question ever arose on those last two sentences calling for a construction by the State Department.

Q. In all your testimony you have made no reference whatever to the accounting officers of the Treasury Department; you have confined your testimony, as I understand it, to the construction of their own regulations by the State Department; is that so?

A. Well, of course, I state only the construction of the State Department.

Mr. Clarke, on behalf of the defendant, offered in evidence the deposition of J. Bancroft Davis, taken in Washington, on the 8th day of November, and read from it as follows:

54 "Q. Mr. Davis, I will ask you whether you have held any official position in the Department of State, and if so, what position and for what terms?

"A. I was secretary of legation in London from 1849 to 1852; I was abroad for the Department in 1862, but not officially; I was Assistant Secretary of State from March, 1869, to November, 1871; I was

agent for the Government at Geneva from that time until November, 1872; I was again Assistant Secretary of State from January, 1873, to July, 1874; I was minister at Berlin from July, 1874, to November, 1877; I was again Assistant Secretary of State from December, 1881, to July, 1882, I think it was.

"Q. I will ask you whether during the periods that you were Assistant Secretary of State the Department of State construed the consular regulations of 1870 and 1874, as regards official and non-official fees."

Mr. WALKER. I object to the last question as incompetent, irrelevant, and immaterial; and for the further reason that the construction of the State Department, in respect to what fees are official or non-official, upon returns of consuls, is of no binding force or relevancy upon the accounting officers of the Treasury, whose authority in that matter is by statute conclusive.

The COURT. My impression is it would be error on my part to exclude the construction of either of those Departments; the State, by reason of its peculiar relations with the consuls; the Treasury Department as the Department with which the money transactions would take place; I think it would be error on my part to exclude the cotemporaneous construction of either Department.

Counsel for the Government excepts on the various grounds stated.

"A. In redrafting the consular regulations in 1874, that subject was a subject of consideration, and it caused some changes to be made in the form of the consular regulations.

55 "Q. I will ask you, then, whether you know what construction was put by the State Department in regard to their character—official or non-official—upon the fees received by consular officers for notarial acts performed by them in matters in which their authority was given by the law of any of the States of the Union?"

Mr. WALKER. I object to that question as incompetent, irrelevant, and immaterial; and further, that any such construction must have been reduced to writing and proved as provided by the statute in relation to acts of the Department.

The same ruling and exception.

"A. I was directed by the Secretary of State to make the change that I have alluded to in drafting the instructions of 1874; the changes that I have referred to are on pages 73 and 74 of the edition of 1874, and are contained in sections 308, 309, 310, 311, and 312, in regard to notarial acts.

"Q. Do I understand then that the changes in the consular regulations, in the sections which you have specified, were in fact setting out in such regulations what you understand to have been the construction placed by the Department of State upon the regulations which existed at that time in regard to those matters?"

The same objections, ruling, and exception.

"Answer. Those changes were made in view of the bearing of the instructions upon that point, but the Department itself had no occasion, at that time, to rule upon it, and I do not remember ever having ruled upon it while I was Assistant Secretary of State. I do not remember of any question coming up that necessitated a ruling upon it."

Cross-examination by Mr. McCUE:

"Q. Mr. Davis, I might ask you just one question—whether the discussions to which you referred, in the State Department, were ever reducing to writing in any way, except so far as the result might appear in the sections in the volume of 1874, to which you have referred?—A. I am not aware that they were.

56 GEORGE CORSA, being duly sworn and examined as a witness for the defendant, testified:

I reside in New York City and had charge of the consular division in Havana under General Badeau; I was connected with the consulate from November, 1882, until April, 1884; that was my first experience; during that time I familiarized myself with the manner in which consular accounts are kept; I have recently at the request of the defendant made examinations in the Treasury Department; I examined the returns for the consul-general at Liverpool during the period from 1870 to 1875; also the consul-general at Brussels during the same period; and the consul-general at Paris; and the consul-general at London; also at Montreal; all for the same period.

Mr. Clarke offered in evidence the letter of the Secretary of the Treasury, dated November 1st, 1886. It was objected to by Mr. Walker as immaterial, irrelevant, and incompetent.

The letter is admitted, marked Defendant's Exhibit E, and read in evidence by defendant's counsel.

56 *a* U. S. district court, S. D. N. Y.

Deft.'s Exhibit E.

[James H. Fish, stenographer.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., November 1st, 1886.

ALEXANDER & GREEN,
10 *Wall Street, New York:*

GENTLEMEN: Replying to your letter and affidavit of the 30th ultimo, requesting to be furnished with certified copies of all consular returns of Treasury fees made between January 1st, 1870, and January 1st, 1880, by the United States consuls at Liverpool, Montreal, Brussels, Paris, and London, to be used as evidence upon the trial of the case of the United States *vs.* Badeau *et al.*, I have to inform you that in the opinion of this Department such returns are irrelevant to the issues to be tried in that case, and that these defendants are not interested in or entitled to accounts of other consular officers not involved in the trial of this case. Your application is therefore refused.

Respectfully, yours,

D. MANNING,
Secretary.

By Mr. WALKER:

In Havana I made up the quarterly returns of the consul; I regard myself as an expert accountant in certain matters; I have studied book-

keeping but have never practiced it to any extent; I think I understand anything pertaining to the accounts of the consular division.

Q. What office of the Government passes upon these accounts first?

A. We sent them to the Treasury Department to the First Comptroller's office, and they were referred from his office to the Fifth Auditor—no, the Fifth Auditor's office and then to the First Comptroller.

Q. Whose decision in reference to that was final, under the rules of the Treasury Department?

A. The Fifth Auditor.

57 Q. You are as sure of that as of any other testimony you have given?

A. So I have been informed.

Q. Now state what the fact was as to each of the returns, each set of returns, from the several consulates during these years, as to their containing returns of notarial fees or not.

Objected to as incompetent, irrelevant, and immaterial, and as not the best evidence.

Answer. Some contained them and some did not.

Mr. WALKER. I make the same objection to this question; and the further one that the question is, Which contained entries of notarial fees; there is no interpretation in the statute or in those regulations of the meaning of the word "notarial," and I object to it as involving and implying a knowledge of the law.

Same ruling and exception.

Answer. In the returns from Liverpool there were no notarial fees; Brussels contained some; Montreal contained none, with the exception of one or two that appeared to have been entered there through a mistake; Paris contained some; London contained a great many.

By the COURT:

Q. And those were Mr. Badeau's?

A. General Badeau's the one's that are here; I am speaking of the whole four years; they were generally scattered through the whole period of four years.

By the counsel for the Government

Those returned from Paris were probably half those returned from London; not in amount but in character of fees received. I think there were about twenty different fees received at the London consulate, and I think about ten of different character at Brussels—ten different kinds of charges at Brussels; twenty at London; my answers have been solely confined to what I call notarial fees.

58 By the COURT:

Q. What I intended to ask you was, not the number of kinds of charges, but the comparative amount or number of the returns of notarial fees charged; you said in Mr. Badeau's account there were a great many; we have had here every one, item by item; they formed many hundreds or thousands, I understand; in your answer you said at Brussels there were some and at Paris some; and I wish you to give the jury some idea of the comparative number of items of notarial charges or returns that you found in the Treasury books as compared with the returns

of General Badeau; not the different kinds of notarial services; I mean the comparative number, in a general way, not of course exactly, but to give some idea of what you mean by the word "some"?

A. About one-tenth as many at Brussels as at London.

Q. That is what you mean by "some"; about one-tenth as many as General Badeau's return?

A. Yes, sir; at Paris the difference wasn't so great; at Paris the return was much greater than at Brussels, but at London the return was probably five or six times as great as at Paris; the notarial fees were not made a separate return from the ordinary quarterly return of any of those consuls; they were all mixed up with the returns for fees for all sorts of services; they were entered on the open account, and the money received for those services purported to be paid into the Treasury.

Mr. Clarke reads in evidence from Exhibit 1 of the Government, from the page following page 158 to the close of the itemized account transmitted by General Badeau. This page contains a recapitulation headed "Notarial fees, from July 10th, 1870, to September 10th, 1875, inclusive." It gives the amounts by quarters and figures up $10,557. And attached to this is the following:

I, George Samuel Recknell, do solemnly swear that the annexed
59 and foregoing is a true and faithful transcript of the notarial fees received at this office on the dates named therein, and that the same was inadvertently entered with the Government fees and returned as such in error to the Treasury Department.

[SEAL.] G. S. RECKNELL.

Sworn at 53 Old Broad street, in the city of London, this 16th day of Sept., 1881, before me.

J. NUNN,
Act. Deputy Consul-General of the United States at London.

ADAM BADEAU, recalled on his own behalf, testified:

Mr. George S. Recknell was a clerk in the office of the consul-general at London at the time of the date of that affidavit, 1881, September 16th, I think; and had been prior to that time for several years; I transmitted an account of notarial fees to the Treasury Department at the time of my sending forward my official account; I presume it was the same as Exhibit No. 1; the account was prepared under my directions by this clerk, as far as the copying was concerned, from the records of the consul-general, and under the very careful and minute supervision of the vice-consul-general, Mr. Nunn, who has served there twenty years and who is now dead, dead within a month; I took very repeated and careful steps to satisfy myself as to the correctness of the account.

Q. Will you describe and state what the services were covered by that account included in that account?

(Objected to by Mr. Walker as incompetent; the account described them.)

The COURT. I think the witness is entitled to state in detail, if desired, what the transactions were which are noted in that account, Exhibit 1, which is put in evidence by counsel for the Government.

Counsel for the Government excepts.

60 Answer. This is a list of notarial fees for services performed at the consulate-general, which were not required by consular regulations.

Answer. They are acknowledgments of deeds done for private individuals for private business; acknowledgments of affidavits such as I claim the Government did not require; acknowledgments of wills; acknowledgments of agreements between private individuals, not under the direction of the United States Government; acknowledgments of probate acts; acknowledgments of power of attorney in private affairs; acknowledgments of assignments.

Q. Between private parties?

A. Private parties always; acknowledgments of certificates of a character not required by regulations, in individual and private matters, and so on.

Q. Describe the different classes?

A. Acknowledgments of powers; in every case I assert that they were for matters between private individuals, and not under the authority of the United States Government; I examined this very carefully with Mr. Nunn, who is as able an expert as the Government ever had; I went over it with him and satisfied myself of the correctness of every item in the list at that time, so as to be prepared to swear to it if it should become necessary; they were acknowledgments of deeds, probate accounts, affidavits in private matters at home; every affidavit there was of that character; there is not a statement in this that was of the character connected with the Government or directed by it; I was authorized by the States to take affidavits.

Q. What was the charge for the authentication of an affidavit; what did you do for that?

A. I certified that such an affidavit had been taken before somebody else and that the individual was a proper person to receive an affidavit.

Q. What was the fact as to that being for private parties in all instances in this account?

A. That was the case; I satisfied myself fully of that; there were

61 authentications of the receipts, authentication of a probate act.

Q. What were acknowledgments of deeds?

A. That was the ordinary acknowledgment of a deed such as is customary in matters at home; these were all for use in the United States, in the individual States of the Union.

Q. And for private parties?

A. For private parties; I instructed my subordinates to be excessively scrupulous, not only at the time this account was made up, but at all other times.

Q. The next one, I find, is the authentication of a receipt?

A. That was also private; everything here is of the same sort, affidavit, power, certificate, disclaimer; I forget whether I mentioned a will; that is all in one quarter; in the next quarter I see no new ones—acknowledgments of transfer, for private parties of course; acknowledgments of revocation in some private business; acknowledgment of mortgages; acknowledgment of conveyances; authentication of notarial act, acknowledgment of satisfaction.

Q. As to all these matters embraced in this account, are you able to state whether or not they were for transactions between private individuals?

Mr. WALKER. I object to that; we have had it twice already.

The COURT. This question relates to the entire schedule and may be answered.

(Counsel for the Government excepts.)

A. They may have been for States, you know, but they were not under the United States Government; there may possibly have been a case in which I had to act for a State, which wouldn't be a private individual.

Q. But aside from that, they were for private individuals or corporations?

A. Yes, in their interests; all without any authority that I know of from the United States.

62 Cross-examined by Mr. WALKER, for the plaintiff:

Q. You have not intended, as I understand you, to state anything more in reference to this account that you attempt to set off, than that in your opinion such a fee was an unofficial fee?

A. I am not the law; I am not the last resort; that is what I acted under.

Q. You acted under your interpretations of the law?

A. Certainly.

Q. Will you please look at the paper that I show you now and tell me if that is your signature?

A. Yes.

U. S. district court, S. D. N. Y.

For identification, Exhibit No. 3.

[James H. Fish, stenographer.]

5. Indictable offenses.—Warrant to apprehend accused. (B. 11 and 12 Vict. cap 42.)

To all and every the constables of the police force for the city of London and the liberties thereof, and to all other constables and peace officers in the said city of London and liberties.

LONDON, *to wit:*

Whereas Frederic Albert Warren, otherwise C. J. Horton, otherwise Austin Bidwell, otherwise Pierce, otherwise Frederic Albrecht, otherwise Walker, otherwise Nelson, late of London (hereinafter called the "Accused") hath this day been charged upon oath before the undersigned, the Lord Mayor of the city of London, being one of Her Majesty's justices of the peace in and for the said city and the liberties thereof, for that

63 the said accused, together with Edwin Noyes, otherwise Edwin Hall, otherwise Howe (in custody), George MacDonnell, otherwise Swift and George Bidwell, otherwise Burton (both at large), in the month of February last, in the said city, feloniously did forge and utter, well knowing the same to be forged, two several acceptances of two several bills

of exchange, each for the payment of one thousand pounds respectively, with intent thereby then to defraud the governor and company of the Bank of England; and also with unlawfully conspiring together to forge and utter the same bills with the like intent to defraud to said governor and company of the Bank of England, contrary to the statute, etc., and against the peace, etc.:

These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said accused and to bring him before me or some other of Her Majesty's justices of the peace for the said city at the Mansion House justice-room in the said city, to answer unto the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this nineteenth day of March, in the year of our Lord one thousand eight hundred and seventy-three, at the Mansion House justice-room aforesaid.

SYDNEY H. WATERLOW, [L. S.]
Lord Mayor.

[Mansion House justice-room.]

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA, LONDON.

I, Adam Badeau, consul-general of the United States of America, for Great Britain and Ireland at London, do hereby make known and certify to all whom it may concern, that Sir Sydney Hedly Waterlow, Knight, who hath signed the annexed warrant, is lord mayor and chief magistrate of the city of London; and that to all acts by him so done full
64 faith and credit are and ought to be given in judicature and thereout.

In testimony whereof, I have hereunto set my hand and affixed the seal of the consulate-general of the United States, at London aforesaid, this twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-three and in the ninety-seventh year of the Independence of the United States.

[SEAL.] ADAM BADEAU.

Q. You see the imprint of the seal at the left of your signature, do you?

A. I do.

Q. Is that the imprint of the seal of the London consulate-general?

A. Yes, it is.

Q. (Handing witness paper.) Look at that paper I now show you and tell me if that is your signature?

A. Yes.

U. S. district court, S. D. N. Y.

For identification, Exhibit No. 4.

[James H. Fish, stenographer.]

[Inland revenue stamp.]

I, Salem Constable Harris, of London, notary public by royal authority, duly admitted and sworn, do hereby certify, to whom it may concern, that the paper writing hereunto annexed, marked A, contains a true and faith-

ful copy of the original bill of exchange to me notary produced, and after due examination returned.

65 Whereof, an act being required, I have granted this one under my notarial firm and seal to serve and avail where need may be, London, the first day of April, one thousand eight hundred and seventy-three.

J. PIDIN,
[SEAL.] SALEM C. HARRIS,
Not. Roy.

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA, LONDON.

I, Joshua Nunn, vice and deputy consul-general of the United States of America for Great Britain and Ireland at London, do hereby make known and certify to all whom it may concern, that Salem Constable Harris, who hath signed the annexed certificate, is a notary public, duly admitted and sworn, and practising in the city of London aforesaid, and that to all acts by him so done, full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof, I have hereunto set my hand and affixed the seal of the consulate-general of the United States at London aforesaid, this third day of April, in the year of our Lord one thousand eight hundred and seventy-three, and in the ninety-seventh year of the Independence of the said United States.

[SEAL.] J. NUNN.

66 A.

(Copy.)

Due Ap. 5.

LISBOCI, *le* 2 *Janvier*, 1873.

B. p. F. £1000. 0. 0.

A trois mois de date payer par cette première de charge à l'ordre de Mons. Eduardo d'Aguiera la summe de mille livres sterline valeur recud selons l'avisde.

R. F. DE S. JOMALO.

A Mons. N. M. ROTHSCHILD, *London*.

5173 accepted 17 Jan., 1873, at Smith banque spuilles N. M. Rothschild cua payer à l'ordre de Mess. John Berenberg, Gossler Cie., Eduardo d'Augiera für uns an die ordre des Herrn F. A. Warren werth in Gulden. Hamburg, 13 Januar, 1873.

John Berenberg, Gossler & Co.

T. A. WARREN.

Q. Please look at your account for the 20th of March, 1873, and state whether you find there an entry for the service of a charge for the execution of a certificate that "Sir Sidney Hedney Waterloo, knight, who hath signed the annexed warrant, is lord mayor and chief magistrate of the city of London, and to all acts by him so done full faith and credit are

and ought to be given in judicature and thereout." Did you receive and credit the Government with the sum of $2 for the execution of a paper such as I have described upon that date?

A. I don't find that charge in this list of notarial fees.

Q. You received certain fees upon that date; the second column in this account indicates the person from whom you received the fee, does it not?

A. There is nothing to indicate that I received that fee.

Q. Is this not your certificate that the lord mayor of Lon-
67 don is competent to do the act embodied in that paper?

A. I don't see anything about my certificate there (referring to Exhibit 1).

Q. Isn't that what you call an authentication of a certification?

A. There is an authentication of an affidavit here; there is no authentication of the signature on that day.

Q. I want to know whether you can say by looking at those papers?

A. I see nothing here to indicate that I returned that fee or received it, on this paper; I see nothing that refers to it.

By Mr. WALKER:

Q. Did you enter such a service as that paper shows on your part; how would you describe your services in reference to such a paper in your account?

A. That would be the authentication of the signature of the lord mayor of London.

Q. What is the official fee for that service in the tariff?

A. According to the tariff, authenticating signatures "of governors, judges, notaries public, custom-house and other officers, $2."

Q. In reference to paper marked for identification No. 4, will you please look under date of the third of April, 1873, and see if it appears in your accounts as a set-off here; that appears to be a protest for a bill of exchange?

A. I can't say whether this is the particular certificate for which there is claim made on the third of April; I can't answer; the entry on the list of fees is, "Bank of England, Certificate 27;" whether this is one of the 27 or not, I can't say.

Q. That is Mr. Nunn's signature, isn't it?

A. Yes.

Q. Is that the seal of the consulate-general?

A. Yes.

Q. You said you had only one reason for doubting; what are your reasons for doubting that this is one of those papers. State them all?

A. The indefiniteness of my memory on the subject, and the indefiniteness of any description in detail of the paper; there are twenty-seven certificates.

68 By the COURT:

Q. That is on one line; one line says twenty-seven certificates?

A. Yes, sir.

Q. Look at these papers marked for identification 3 and 4, and say if they are (referring to your testimony on the direct) what you call transactions for private parties?

A. The paper which attests the signature of the lord mayor I should say is not for a private party; the second paper I should say was.

The certificate on Exhibit 3 is read in evidence by counsel for the Government, as follows:

"CONSULATE-GENERAL FOR THE
UNITED STATES OF AMERICA, LONDON:

"I, Adam Badeau, consul-general of the United States of America for Great Britain and Ireland at London, do hereby make known and certify to all whom it may concern, that Sir Sydney Hedley Waterloo, Knight, who hath signed the annexed warrant, is lord mayor and chief magistrate of the city of London, and that to all acts by him so done full faith and credit are and ought to be given in judicature and thereout.

"In testimony whereof I have hereunto set my hand and affixed the seal of the consulate-general of the United States at London, aforesaid, this twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-three, and in the ninety-seventh year of the Independence of the said United States.

"ADAM BADEAU."

Mr. WALKER. The seal attached to this instrument is circular in form, and on the outer line are the words "United States Consulate-General, London." In the center of the seal is the American eagle.

By Mr. WALKER:

Q. I ask you in reference to exhibit for identification No. 4,
69 whether this is a paper such as you described in your testimony as a transaction between private parties?

A. Yes, I should think it was.

Q. Look at the paper marked Exhibit No. 5 for identification; you have testified, I believe, that that is your signature at the foot of it?

A. Yes.

U. S. district court, S. D. N. Y.

For identification, Exhibit No 5.

[James H. Fish, stenographer.]

The people of the State of New York, to Adam Badeau, esq., United States consul at London, England:

Know ye, that we, with full faith in your prudence and competency, have appointed you commissioner and by these presents do authorize you to examine Alexander McAndrew as witness in a cause pending in the supreme court of the State of New York, for the city and county of New York, between Alexander McAndrew and Samuel Mann, plaintiffs, and D. D. T. Marshall, defendant, on the part of the plaintiffs, on oath, upon the interrogatories annexed to this commission, and to take and certify the depositions of the witness, and return the same according to the directions hereunto annexed.

Witness, Hon. George C. Barrett, justice of our said supreme court, the 4th day of November, one thousand eight hundred and seventy-six.

By the court.

[SEAL.] WM. WALSH,
Clerk.

70 *Direction for executing the commission.*

The persons to whom such commission shall be directed, or any of them, unless otherwise expressly directed therein, shall execute the same as follows:

1. They or any one of them shall publicly administer an oath to the witnesses named in the commission that the answer given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him and certified by such of the commissioners as are present at the taking of the same.

3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners.

4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits of the commission, upon which their return shall be endorsed; and they shall close them up under their seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence.

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post-office.

6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

The above is an extract from the revised statutes of the State of New York (4th ed.), vol. 2, page 639, relating to the taking of testimony out of the State.

71 It is hereby consented that the within commission when executed be returned to Beach & Brown, plaintiff's attorneys, No. 120 Broadway, New York City, by mail.

Dated New York, October 28th, 1876.

SEWELL & PIERCE,
Def't's Attys.

This commission, when executed, is to be returned to Beach & Brown, plaintiff's attorneys, No. 120 Broadway, New York City, by mail, postage prepaid.

GEO. C. BARRETT.
J. S. C.

The execution of this commission appears in certain schedules hereunto annexed.

ADAM BADEAU,
Commissioner.

Here follows interrogatories and answers.

To the honorable the justices of the supreme court of the State of New York for the city and county of New York:

I, Adam Badeau, consul-general and notary public ex officio of the United States of America, at London, England, do hereby certify that in pursuance of the annexed commission I did, on the seventeenth day of January, A. D. 1877, cause to appear before me the within-named Alexander McAndrew, and did carefully examine him separately and alone upon oath, in answer to the interrogatories hereunto annexed, and did cause the examination of said deponent to be carefully reduced to writing by Francis William Frigout, a disinterested person appointed by me as clerk for that purpose, and the same to be carefully read to the said deponent, and his said deposition to be then subscribed by him in
72 my presence. And I further certify that before giving his deposition as aforesaid he was by me carefully cautioned and sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause in which said deposition was to be taken. And I did in all respects conform to the directions contained in said commission. The said examination taken as aforesaid together with said commission I do hereby return to Beach & Brown, plaintiff's attorneys, 120 Broadway, New York.

In testimony whereof I have hereunto set my hand and affixed my notarial official seal, at London, England, aforesaid, this the 17th day of January, A. D. 1877.

[SEAL.] ADAM BADEAU,
Commissioner.

Q. What does that paper appear to be?
A. This is a commission for taking testimony.
Q. What seal does it bear?
A. The seal prescribed or authorized by the State Department for consular seals when they acted as notaries public without the authority of the United States, prescribed in 1874, but not before that time.
Mr. WALKER. I move to strike out the answer; the witness is construing the law of the land and the law of this case.
The COURT. I think I shall allow his answer to stand as descriptive of the seal.
(Exception.)
Q. You provided that seal at your own expense?
A. Yes.
Q. It was paid for by the Government?
A. No.
73 Q. When did you prepare it?
A. Immediately after I ascertained the instructions of the Department on that subject in September, 1875; and after September, 1875, I used this seal in respect to acts that I regarded as notarial.
(The seal and signature in this paper are offered in evidence.)
Mr. WALKER. The seal is three-eighths of an inch greater in diameter than the seal of the London consulate; it contains on the circumference the words, "United States consulate-general, London;" in the centre it contains the American eagle, and between the outer words on the circum-

ference and the eagle are these words, "Notary public, ex officio;" the date of January 17th, 1877.

Q. Did you hold any other office under any other Government or under the Government of the United States during the period of your service as consul-general at London than the office of consul-general?

A. I was appointed notary public under numerous State rules and laws. I did not receive a commission; but the laws were passed stating that the consul of the United States under certain laws held the position of notaries public.

Mr. WALKER. I move to strike out the answer as not responsive.

(Motion denied; counsel for the Government excepts.)

I never received a commission from any government of any State of the United States appointing me a notary public to serve in London, or from any other executive officer of any government for that purpose. I mean to be understood as saying in respect to my being a notary public. That was my construction of certain statutes authorizing me to act as notary public.

74 U. S. District Court, S. D. N. Y.

Government Exhibit No. 6.

[James H. Fish, Stenographer.]

No. 2058.

UNITED STATES OF AMERICA,
DEPARTMENT OF STATE.

To all to whom these presents shall come, greeting:

I certify that the document hereto annexed is a true copy from the records of this Department.

In testimony whereof, I, Thomas F. Bayard, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 15th day of November, A. D. 1886, and of the Independence of the United States of America the one hundred and eleventh.

[SEAL.] T. F. BAYARD.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To all who shall see these presents, greeting:

Know ye, that reposing special trust and confidence in the abilities and integrity of Adam Badeau, of New York, I have nominated, and by and with the advice and consent of the Senate, do appoint him consul-general of the United States of America at London, and such other parts as shall be nearer thereto than to the residence of any other consul or vice-consul of the United States, within the same allegiance; and do authorize and empower him to have and to hold the said office, and to exercise and
75 enjoy all the rights, pre-eminences, privileges and authorities to the same of right appertaining, subject to the conditions prescribed by law: The said Adam Badeau demanding and receiving no fees or perquisites

of office whatever, which shall not be expressly established by some law of the said United States; and I do hereby enjoin all captains, masters, and commanders of ships and other vessels, armed or unarmed, sailing under the flag of the said States as well as all other of their citizens, to acknowledge and consider him, the said Adam Badeau, accordingly; and I do hereby pray and request Her Britannic Majesty, her governors and officers, to permit the said Adam Badeau fully and peaceably to enjoy and exercise the said office, without giving or suffering to be given unto him any molestation or trouble; but on the contrary, to afford him all proper countenance and assistance, I offering to do the same for all those who shall in like manner be recommended to me by Her said Majesty.

In testimony whereof, I have caused those letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand at the city of Washington the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

[L. S.] U. S. GRANT.

By the President:

HAMILTON FISH,
Secretary of State.

Q. If I understand you, you discovered that the fees for what you call notarial services that you had paid into the Treasury from June, 1870, to September 27th, 1875, you made the discovery in the month
76 of September, did you not, that in your opinion, you were entitled to those fees?

A. No.

Q. You discovered in August, 1875, that the fees that you paid into the Treasury for your services that you call notarial from July 27th, 1870, to September 10th, 1875, were in your opinion erroneously so paid; is that so?

A. I first heard of the decision of the State Departments on that subject in August; either late in July or early in August, and immediately thereafter I got a new seal; prior to the 10th of September.

Q. And you having this claim against the Government for the return of these fees, that you had paid into the Treasury, did nothing about it in the way of presenting your claim until your term of office expired; is that so?

A. That is true.

Q. And you waited until you had the sum of $13,463.05 in your hands, the property of the Government, before suggesting this claim?

A. I had property to that amount in my hands, of the Government's, during all that period.

Q. I understand you to have said that you had some $13,000 in your hands all the time from 1870?

A. I had more than that; I had a running account, and a great deal of money passed through my hands, $50,000 or $60,000 a year.

Redirect by defendant's counsel:

Q. Exhibit 1, which the district attorney has called your attention to, was your final account returned to the Government?

A. Yes.

Q. And in that account you claimed the credit for $10,557 fees, the subject of this dispute?

A. Yes; aside from that I have paid all the money that I have received, or which has been charged to me by the Government; the account of a consul is not finally settled until he goes out of office; the consuls have a running account; it is an open account; the admitted deficiency of $15,000 on the seaman's account has been paid; the Government
77 makes no claim against me except for the $10,557; when I entered upon my duties of office at the London Consulate my salary was $7,500 per year, and that salary continued two or three years, when it was changed to $6,000, and was $6,000 during the remainder of my term of office.

Q. What was the practice in the office in regard to the use of the seal and the various kinds of business which you claim to be distinguished from the notary business in which you used the official seal?

A. I used the official seal upon invoices and upon all papers which, according to my conception of the law, I was required to execute by the United States Government for official or commercial purpose of the United States; these are the duties that I performed: Authenticating copies of call, warrant and report of survey on vessel, hatches, cargo, provisions and stores; estimates of repairs of vessels; reports of survey on vessel or cargo; certificates to bills of health; invoice of goods; acknowledgments of master to bottomry bonds; of master to the payment of seamen's wages; authenticating copies of advertisements for funds on bottomry; certificates to a seaman of his discharge; for master to take home destitute American seamen; declarations, oaths and affidavits, to one or more desertions or losses of seamen overboard at sea; to ship's inventories or stores; to ship's bills and vouchers; consul's certificate of inventories of vessels; estimates of repairs on vessels: consul's orders to send seamen to hospital; to send seamen to prison; to release seamen from prison; passports; for extending marine protests; for preparing documents; for preparing any other official document or instrument of writing not herein enumerated—meaning when required by the Government; recording documents; appointing new masters. All of these are official, all I returned the fees for: all of those are used with the official seal of the Government, and I should say a hundred more; there are a hundred and seven prescribed.

78 Q. Is that in 1870 or 1874?

A. This is 1874; I think the tariff is almost identical in both; there may be one item or so different, but it has been the same for years; I returned all to the Government except those I considered were not required by the Government, under this regulation; I used my official seal on all the acts mentioned in the tariff of fees; that seal was only required for several years; it was only a temporary regulation; it isn't required now, unless it has been since I left the consular service in Havana.

(Defendant rests.)

Mr. WALKER. I read from plaintiff's Exhibit 1 the letter of William Lawrence, Comptroller of the Treasury, to Charles J. Folger, the Secretary of the Treasury, in respect to the question which is for your consideration in this case. After stating what the claim of Mr. Badeau is, that

certain of these fees are not to be paid into the Treasury, that the sum of $10,557, which he had paid in should be paid back and credited to him on the amount of money that he had in his hands, the Comptroller goes on to say:

"The accounting officers are not advised of any 'decision of the Department' or 'regulations of the Government,' under which the fees claimed as notarial, for the period named (July 27th, 1870, to September 10th, 1875), could be justly construed to be such; and certainly no sanction was given by them that the same class of fees should be retained by General Badeau (or any other consular officer) subsequent to September 10th, 1875, until the consular regulations of 1881 went into effect, on the first day of September, 1881. If the fees of the class in question were retained by General Badeau, as he alleges, from September 10th, 1875, until the termination of his official services as consul-general at London, September 16th, 1881, it was without the knowledge or approval of the ac-
79 counting officers of the Treasury; and had an official statement or transcript of such fees been rendered, General Badeau would have been charged therewith in the settlement of his accounts up to September 1st, 1881, when the regulations of 1881 took effect, which made considerable modification of the former regulations with respect to the fees for which consular officers are accountable to the Government."

Mr. WALKER. I read further from the same letter under date of April 22d, 1884, referring to these various sections of the consular regulations as follows:

"From the foregoing it will be seen that the fees now claimed by General Badeau as notarial were strictly official, as provided for in the consular regulations in force during the period of time in which said fees were collected. They were returned by him in his accounts as official fees, and properly charged as such under the well-settled ruling and construction which was applied uniformly in the settlement of the accounts of all consular officers at that time."

Mr. WALKER. I read from a letter to Adam Badeau from William Lawrence, Comptroller, under date of May 8th, 1884:

"I can hardly regard the letter in question as a 'formal ruling' by the Department of State, as indicated in your letter of the 30th ultimo to the Secretary of the Tre sury, since it is merely an expression of opinion by Mr. Cadwalader, then Assistant Secretary of State, as to the construction of the consular regulations of 1874 in relation to notarial fees. It does not attempt to repeal or set aside any of the provisions of said regulations. An an expression of opinion by the Assistant Secretary of State, it is entitled to due respect and consideration, but is not conclusive or binding upon the accounting officers of the Treasury, especially in view of
80 the fact that none of the provisions of the consular regulations of 1874 were officially set aside or repealed until they were superseded by the regulations of 1881." * * *

"You will thus observe that in the settlement of your accounts as late U. S. consul-general at London, the same rules have been observed that have been uniformly applied in the adjustment of the accounts of all consular officers of the United States, and, as stated in a former communication, claims of other consular officers for the allowance of fees claimed as

notarial, precisely similar in character to the claim preferred by you, have been acted upon by this office, and formally disallowed. It may be further observed that even if it had been the intention of Mr. Cadwalader to set aside or repeal the provisions of the regulations of 1874, in relation to official and notarial fees, he could not have done so. This would not be within the power of the Secretary of State, since, under the law, the tariff of fees to be observed by consular officers of the United States is prescribed by the President."

JOHN WALKER, being duly sworn and examined as a witness for the Government in rebuttal, testified:

I am a clerk in the First Comptroller's Office, and have been between thirteen and fourteen years; I am familiar with the course of proceedings in respect to accounts of consuls; they are first sent to the First Auditor of the Treasury; they are sent quarterly; the law and regulations require them to be so sent; the First Auditor states the account and submits it with the papers to the First Comptroller for his examination, revision, and certificate; the final acts as to those accounts as to allowance or disallowance is done by the First Comptroller; I am familiar with the practice in the Comptroller's department in respect to the question involved in this suit, as to whether those fees are official or unofficial.

81 Q. Will you state what, if any, interpretation or construction has been given by the Department of the Government which you represent to the section of the consular regulations which I will read to you: "All acts are to be regarded as official services when the consul is required to use his seal and title officially, or either of them; and the fees therefor are to be accounted for to the Treasury of the United States?" I read section 312 from the Manual of 1870.

A. There has been.

Q. Ever since you have been in the Treasury Department?

A. This question has come up several times in connection with the examination of old accounts, and we have always construed it to mean where the consul wrote his name and signed himself U. S. consul, or stamped his official seal as consul; on the papers where he used his name or seal officially, where it was used on the paper, we considered that an official fee under the consular regulations; wherever he used his name or seal officially, either or both of them.

By Mr. WALKER:

Q. You have heard read the statements contained in the letters in respect to this subject by the Comptroller of the Treasury?

A. Yes, sir.

Q. And I understand from your present statement that these views condensed are your own?

(Objected to; objection sustained; counsel for the Government excepts.)

Q. In your opinion is the practice of the Departments during the time of your service there correctly stated in the letters of the Comptroller of the Treasury?

(Objected to; objection sustained; counsel for the Government excepts.)

Mr. CLARKE. I desire to read to the jury some letters of General Badeau, a portion of the correspondence which has been read by the dis-

trict attorney. From the letter of December 14th, 1882, to the Fifth Auditor of the Treasury, dated Havana, Cuba:

"Referring to my final accounts herewith forwarded, and the items
82 therein credited to me for notarial fees, paid over by mistake to the Government, I have the honor to state, that on entering upon the discharge of my duties, August 26th, 1871, my predecessor then being ill and absent, and he not visiting the consulate-general for years afterwards, I was informed and supposed that all notarial fees were official, and to be accounted for to the Government. Accordingly, I did not account for them, and turned them over for several years, although by law and consular regulations they were my own private property. (See act of August 18th, 1887, sec. 54; also consular regulations for 1868, paragraphs 540 and 541; 1870, paragraphs 307 and 308; 1874, paragraphs 308–12; 1881, paragraphs 473 to 481; also dispatch from the State Department to the consul-general at Montreal, March 1st, 1875.)

"No intimation was made to me from any quarter that I was entitled to these fees, until, in the summer of 1875, I discovered that other consuls were, with the sanction of the Government, drawing and retaining for their own use such notarial fees. I thereupon made inquiry and ascertained the decision of the Department, and on September 16th, 1875, with the full knowledge and sanction of the Government, began retaining all notarial fees, except those connected with Government matters, or which were in any way claimed by the Treasury. I continued this course up to the termination of my services as consul-general at London, September 16th, 1881, under the explicit regulations of the Government, and under the same law which was in force on the subject when I entered upon my duties as consul-general.

"I made, however, no statement of the fees erroneously paid over by me prior to September 10th, 1873, reserving this account for my final settlement with the Government.

"The fees in question, being supposed by me at the time (erroneously) to
be official, were all returned in detail to the Treasury, and the returns
83 will all be found in the archives of the Government. A copy is also on file at the consulate-general at London. I have, however, caused a separate copy to be made of those for which I make deduction, which will be found hereto annexed.

"In this return will be found a statement of each individual fee, the date and nature of the service performed, the name of the person for whom the service was performed, and the charge made by me and afterwards under a misapprehension paid to the Government; so that every item can be examined and identified.

"In accordance with not only my own course, but that of the Government during my entire service as consul-general, I have not deducted the sum of these fees previously mistakenly paid, and present it in my final accounts for settlement."

Mr. CLARKE. The remainder of the letter relates to the other items of the account, which have since been adjusted. I read also from Mr. Badeau's letter to Charles J. Folger, dated April 30th, 1884:

"I have the honor to acknowledge the receipt of your communication of the 24th inst., with reference to my claim to be allowed certain notarial

fees, and enclosing a copy of a communication from the First Comptroller on the same subject, setting forth his grounds for the disallowance of the claim.

"The Comptroller is evidently unaware of the fact that in 1875 the State Department promulgated a formal ruling by which consuls were instructed, that, with certain specified exceptions, 'all fees received for notarial services or for services rendered in taking acknowledgements of deeds may be retained by the consular officer as fees received for unofficial services, and need not be accounted for to the Treasury.'

"As the decision of the Comptroller as well as his entire argument is based upon the supposition that the regulations of 1881 are those relied upon by consuls in retaining notarial fees, I beg to enclose a copy of the instructions of the State Department of March 1st, 1875, which
84 was furnished at the time to the consular officers asking information on the subject.

"This instruction, it will be seen, refers to the regulations of 1874, which, as the Comptroller justly remarks, are precisely similar on this point to those of 1870. The instruction does not reverse a previous ruling, for, as I have heretofore shown, none such existed; but it points out a course to consular officers which they evidently had the same right to follow before as after this exposition of the State Department.

"All the consuls in Great Britain, and to my certain knowledge, various others, probably all in the service have retained all notarial fees, with the exceptions specified, since the date when they became aware of this ruling of the State Department.

"It is possible that with the knowledge of this instruction the Comptroller may see reason to revise his views."

Mr. CLARKE. I read also from General Badeau's letter to the Secretary of the Treasury dated May 16th, 1884:

"I have the honor to state that I have received a communication from the First Comptroller dated May 8th inst., with reference to that forwarded by me to yourself April 30th, regarding my claim to certain notarial fees. A copy of this communication will doubtless be furnished to you, from which you will perceive that the Comptroller now bases decision on entirely different grounds from those previously stated. He wrote April 22d that no sanction had been given by the Department or the regulations of the Government to the retention of such fees prior to 1881, and when I forwarded a copy of the instruction of the State Department in 1875, expressly and in terms authorizing such retention, he stated that he had been aware of this instruction all along, but that it would not be within the power of the Secretary of State to repeal or set aside the pro-
85 visions of consular regulations, since under the law the tariff of fees is prescribed by the President, that is to say that the Secretary of State does not speak to his subordinates in the name or by the authority of the President.

"In view of this extraordinary contention, which I can not conceive will be maintained by a co-ordinate member of the Government, in view also of the fact that the decisions of the Comptroller have been so repeatedly set aside by the courts, I have the honor again to request that this case be referred to the Court of Claims."

Testimony closed.

Mr. WALKER. If your honor please, I move for a direction of a verdict in favor of the Government for the sum proved, $12,742.78.

The obvious grounds for this motion are:

1. That there is no disputed question of fact. Even if there were a disputed question of fact, the case, being one in which the interpretation of official duties is concerned, is solely a question of law for the court.

2. That in this form of action the defendant is not entitled to assert the claim which he sets up here to recover moneys long since paid into the Treasury; this being an action to recover moneys had and received by Mr. Badeau, he sets up an offset or counter-claim seeking to have deducted from this amount the sum paid into the Treasury between 1870 and 1875.

And lastly, if he could set up such a claim in this action instead of going to the Court of Claims, it is one that can not be entertained in law, for the reason that if we supposed Mr. Badeau to have been right in his law, he has made a voluntary payment to the Government who claimed
86 these fees; and having acted under a mistake of law, the money can not be recovered back.

Mr. CLARKE. I move, if your honor please, for a direction of a verdict in favor of the defendant.

Agreeing with the district attorney, I do not see here any disputed question of fact, any question which the court can not properly pass upon, any question on which I could ask to go to the jury.

In answering the grounds of the district attorney's motion I shall state the grounds of my own motion, which are practically two in number:

First. That whatever the rights of this defendant might be as against the United States, having voluntarily paid over his money he loses those rights. Although the district attorney has repeatedly said in the course of the trial that this is an action for moneys had and received, whenever he comes to argue this point he makes it appear as though we were here voluntary claimants to recover from the Government a sum of money. I call your honor's attention to the complaint. This is an action for the balance due on an account commencing on July 1st, 1870, and running until September 16th, 1875, and it appears indisputably here in evidence that during all that time it was an open account.

The substantial controversy in this case is whether these fees, aggregating $10,500, belong to General Badeau or to the Government. The district attorney says they belong to the Government, because the tariff of fees put forth in the consular regulations prescribed the rate of fee to be charged for similar documents. Now, it is in evidence here, and if it were not in evidence it is a fact which I think the court will take judicial cognizance of, that not one of those papers specified in that tariff of fees might not be papers in which the Government would be directly interested, and which the consul might be required to certify under the laws of
87 the United States, and therefore the fee chargeable according to that tariff in such cases would be returnable to the United States, and it would be appropriate for such papers to be put into the tariff of fees fixed for those papers where the United States was interested.

Renewing my motion for the direction of a verdict in favor of the defendant on the following grounds, I submit the case:

1. Sec. 1445 authorizes the President to prescribe from time to time the rates or tariffs of fees to be charged for official services, and to designate

what shall be regarded as "official services." Thereupon nothing that the President has failed to designate as an official service can be regarded as such.

2. That section of itself recognizes the fact that a consul may render services which are unofficial.

Mr. WALKER. Before any disposition is made of the pending motion, I desire, under the rule which authorizes the form of pleadings to be changed to conform with the proof, to strike out the figures "70" in the second line from the bottom of page 1 of the complaint and insert the figures "81," so that it will read "the first day of July, 1881," and the "16th day of September, 1881."

The grounds of this motion are that it appears by Exhibit No. 1 that Mr. Badeau's accounts are completely and entirely settled up to this date, which I have given, July, 1881, and that the moneys ($13,000, plus) which he now has in his hands are the proceeds of official fees received by him from July 1st, 1881, instead of July, 1870, to September 16th, 1875. The transcript shows the facts that I have stated conclusively, and the statement of Mr. Badeau in his final settlement agreed with that view. There is no question of fact here at all, but that was an error in the original figures in inserting 1870 instead of 1881; and the rule is well settled that when the testimony is in the pleadings may be amended to conform to the facts proved.

88 Mr. CLARKE. My answer to this motion is two-fold. First, that if the motion is granted it changes the form of action entirely from an action for moneys had and received to an account stated; and, secondly, that Exhibit No. 1 shows the reverse of what the district attorney has stated: That the account was an open account, as has been testified to, and the claim is upon the balance of it. There are various charges made in the account all through it, indicating that the whole account was gone over, and, although it was found to be correct in particular dates, at other particular dates it was found incorrect in slight particulars. An examination of the exhibit will show that to be so. As it seems to me, it is sufficient answer that it changes the entire character of the action.

Mr. WALKER. It would be possibly sufficient if it were true. It is an imperfect pleading, but it states what seems to me a good cause of action for money had and received.

The COURT. If the statement of counsel is correct, that the account as presented here contains alterations running way back, it shows that the complaint was really drawn in accordance with the acts of the Treasury Department itself.

Mr. WALKER. That is a question of fact. I say that these accounts show that the accounts of Mr. Badeau were adjusted.

The COURT. The court has of course official knowledge that there is a certain kind of settlement that takes place quarterly; that these accounts are passed after a certain fashion quarterly, but, if I recollect right, there are two witnesses that have testified here that the accounts are never settled until the officer is out of office.

Mr. WALKER. I refer to the certificates made by the Register of the Treasury.

The COURT. I find here a certificate dated in 1872 which seems to substantiate the statement of counsel that the Treasury Department have

treated this account as an open account, going back from the year
89 1872. If that is so, it seems that the complaint was drawn intentionally to cover the whole period, because the Treasury transcript was so made up; and that accords with the testimony of two of the witnesses, I think, that the account was not settled until Mr. Badeau went out of office.

(Motion denied; counsel for the Government excepts.)

The COURT. And that leads to the first question presented in the application of each side, that the court direct a verdict, on the ground, as presented by the plaintiff's counsel, that the claim made here in behalf of the defendant to the notarial fees could not be allowed, on the ground that his previous payment of them to the Government was a voluntary payment, and therefore beyond any further judicial action.

It was upon the ground that this action was brought for an account from the consul for the whole period of the consular work at London, that it seemed to the court that that principle did not apply here. The defense, accordingly, does not set this up as an independent cause of action, or as a counter-claim, but is simply a denial with particularity of the allegation of the complaint that so much money is now due (and) owing to the Government.

Upon a cause of action of that kind the whole account being before the court, no case has been submitted to me, and I do not recall any in which the court has refused to correct any errors which were proved to exist in the whole account which was before it on either side; and that seems to me is all the answer that is necessary to that claim; and upon that ground I must deny that part of the motion.

The other question, as to whether the moneys collected represented in Exhibit 1 were moneys rightfully retained by the consul, or are to be treated as official moneys for official services, is no doubt a question of some embarrassment. Different views may very easily be entertained on the subject. To some extent this is, I think, in consequence of the
90 different relations which the officer holds to different persons or different jurisdictions.

There is very plainly a distinction between the mere acts of an official personage and official acts or acts done by that personage officially. Every official personage may do, and does do, a multitude of acts that are not official. It does not make his act official that he signs his title of office; nor even, as I think, the mere fact that he should add his seal of office, if he has a seal. The question whether it is an official act or not, whether the act is done officially, must depend upon other considerations than the mere presence of a formal signature, or even the presence of the print of a seal.

A few illustrations, I think, will make this clear. Suppose Mr. Badeau, in London, being consul-general, observes an advertisement in a newspaper of some Western property which he would like to purchase. An entire stranger to the place, or to the advertiser, he addresses him on the subject and signs his name with his title of office; and, as a further indication that he is a responsible person and the person he professes to be, he might even put the print of his seal on the sheet of paper, or might use paper that bore the heading of the consulate. No one would imagine that an act of that kind was an official act; it is purely private, for private purposes, as shown by the very nature of the business. The use of the

seal might be unauthorized, but if it is not prohibited no harm would be done, no law would be violated; it would be a mere question of individual taste, or, possibly, of propriety. The use of the seal would show to the recipient who the person was that addressed him.

To take another step. Suppose two persons in New York have a dispute about some matter of fact in London, knowing no one there to ascertain the fact, and not even personally knowing the consul, they may agree to let the consul ascertain it, if he will, and write to him to that effect, promising to pay him ten dollars for his trouble, and at the same
91 time suggest to him, as they do not know him, to add his title and put his seal to his answer, that they may know that he is the person that they indicate. The consul does it; receives the pay. It is purely a private matter, having nothing to do with the business of the consulate, resting purely upon the request of the two persons, and having no legal validity whatever for any purpose; an act done simply to satisfy the two persons concerned as to a fact in London.

There again the use of the seal may be unauthorized, though there were no law prohibiting it; it has no official character, and shows only that the person who received the paper and who signed it was the man they intended. The consul, the official personage, has done an act; he was requested to do it because he was consul; but, nevertheless, the act was an act wholly unofficial in its relations to the United States.

It is only another step when the court, under the agreement of parties to a litigation, give a dedimus potestatem to a consul in London to take testimony between the parties and return it under his hand and seal; he acts in that case solely upon the business of the private parties or of the court. It has nothing to do with the business of the Government or with any proper business of the consulate. He puts his official title and the seal of his office to it because it is not prohibited, and because it serves to attest the fact that he is the person that the court wished to take the testimony. Nothing in the use of the seal or the title makes the act official in its relations to the Government; that is to say, official in the sense of the U. S. Statutes; he acts officially so far as the appointment of the court goes; it is the consular personage that was asked to do the work.

So when a State statute declares that, for the purpose of recording mortgages or deeds or powers of attorney, persons in London may go before the United States consul and acknowledge such papers in the form
92 prescribed by the State law, and when he certifies them under his hand and seal they shall be entitled to be recorded, there again is an act done by the consul under authority and wholly in pursuance of a State law; it has nothing to do with the business of the consulate; the seal and the title show that it is done before the official personage specified in the statute for doing the act. It isn't an act of the consulate any more than the others, therefore it is not an official act in the Federal relations of the officer to the U. S. Government.

And that suggests another distinction which I think tends to clear up a little of this difficulty, viz, that an act may be official in reference to one jurisdiction and not at all so in reference to another jurisdiction. When an official personage is directed to do an act, in a certain sense you may say he is acting officially; that is to say, it is the official personage that acts—merely in that sense, but truly he acts officially only when he acts

in pursuance of the authority granted or empowering him to act. There are many persons in this city who hold commissions to take depositions or the acknowledgments of deeds, or other papers, from every State in the Union. The commissions are entirely independent. The act of a commissioner for Maine in taking acknowledgments for the State of Maine is official, as respects the State of Maine in doing that act. It has no official relation to the State of California, because he holds a commission from California.

And so I think where a consul is commissioned as consul by the United States with specific powers, and duties and obligations which are extremely numerous, and embrace a vast variety of subjects which are within the consular duties, and, nevertheless, in addition he is empowered by a wholly independent authority, viz, by the State laws, to do certain acts under the State laws for State purposes, having no relation to United States business or the United States interests, in doing those latter
93 acts he acts officially in regard to the State statute, and in regard to the State authorizing it, but not officially in his relations to the United States.

When, now, we turn to the United States Statutes we find, I think, in them a recognition of the various characters in which a consul may act. The first section cited, 1745, in authorizing the President to prescribe what shall be regarded as official services, adds, "In the business of the several legations;" that is to say, if it is within the scope of the business that belongs to the legation as business. What is intended? Does it mean State business? Does it mean private business, having nothing to do with the United States; or does it mean business that is governed and contemplated by the United States Statutes, within the United States jurisdiction—subjects of interest to the United States, and about which they are legislating?

The next section says that all fees collected by diplomatic and consular officers "for and in behalf of the United States shall be collected in the coin of the United States." That is apparently a recognition that there may be fees that are not collected in behalf of the United States.

Section 1750 is general authority to consuls "to perform any notarial act which any notary public is required or authorized by law to do within the United States," prescribing what shall be the effect of it. The construction given to such statutes, so far as I am informed, and which the court regards certainly as the correct one, is that these statutes relate to such acts as are within the scope of the jurisdiction of the Federal Government. By this general language is not intended acts which belong to a wholly different sphere. Section 1750 does not authorize the consul to perform notarial acts in regard to matters of State practice or State law only, and which are governed by State law; and in saying what shall be the force and effect of a consul's notarial act in London, it doesn't
94 mean as regards business which belongs to the States exclusively to regulate.

The construction given to such acts, drawn in general language, is that they relate to subjects that are within the province of the United States Government—subjects within its jurisdiction.

For these reasons my judgment is, therefore, that not only these three sections of the statute which have been referred to, but the regulations

themselves issued by the President in conformity with section 1745, are all to be construed as referring to those subjects which belong to the jurisdiction, to the business, to the interests, of the United States. In other words they concern Federal relations, and not relations which are exclusively individual or State, and which have no reference to United States business or to United States interests.

When, therefore, the President, defining, under the authority to define, "what shall be regarded as official services in the business of the several legations," says by section 312 of the regulations of 1870, "All acts are to be regarded as official services when the consul is required to use his seal and title officially," it means "officially," in relation to the United States, to the business of the United States, to the subjects which are subjects of United States legislation. So that when the consul, that is to say, the official personage merely, does an act purely by virtue of an independent sovereignty, purely by virtue of State law, an act which has no force or validity except under a State law, that act is not official in its relations to the United States because it has no relation whatever to the United States.

I think, therefore, upon the evidence in this case, as testified to by General Badeau, viz, that "all items in Exhibit 1 were for business done under State laws," that so far as the acts of General Badeau, who was simply the consular personage, related to business in which the United States Government had no interest whatever; so far as they related to subject
95 matters which were wholly outside of the jurisdiction of the United States; so far as those acts depended for their validity on State laws, or the laws of some other sovereignty than the United States, and he was acting under those laws, and those laws only, those acts are not official acts in his Federal relations, and not within the scope or province or intention of either these statutes or of the regulations of the President.

The modified regulations of 1874 I understand precisely in this sense. And it is to be noticed that the clause defining what are "official services" is identically the same in the two sets of regulations; evidently in the new regulations they were not supposed to be contradictory to other provisions. The additional regulations of 1874 were amplifications of the understanding of the State Department as to what the consul might do in his individual capacity or for his individual benefit, although acting as a consul in his relations to an authority from other States, or from other jurisdictions. And these regulations point out specifically that circumstance, that "in doing these acts he is acting entirely outside of the regular duties and responsibility of the consular office, as recited in section 321."

Section 312 says: "It is to be understood that in such cases the consular officer does not act in his quality of an agent of the Federal Government, but simply as a citizen of the United States, whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual," i. e., an official personage doing those acts under the authority of laws from other States or other sovereignties, which laws might have appointed any private individual to do precisely the same acts.

This construction seems to me to be not only in harmony with the settled construction of the United States Statutes in limiting them to the subjects of Federal jurisdiction, but also as being entirely just, and bene-

ficial. Because the consul's acts in these matters are entirely vol-
96 untary, there is no obligation upon him to do these acts, if they are such as I speak of. And if he is under no obligation whatever to do these acts, if it is entirely outside of the consular business, the Government has no interest in the question whether the acts are done or undone. What equity therefore is there in the Government's demanding the fees for his labor, which is purely voluntary and outside of his duties, if he does do them? Congress might of course prohibit his doing such acts; they might prohibit the use of the seal to evidence that he had done them; but it is for Congress and not the court to say how far he shall use the seal, or when he shall not. As I have said at the beginning it seems to me that the mere fact that he uses a seal about a matter which is no matter of the United States, no business of the United States, doesn't make it official in its relations to the United States.

It is to the convenience of American citizens, possibly of others, that services of this kind should be done by the consul, or by some one in his position. He is under no obligation to do them; and if he is not to be paid anything for doing them, if his fees are to be returned to the Government, that wholly discourages the doing of such acts and would lead naturally to their discontinuance, and, of course, to the inconvenience of citizens to that extent. Whenever Congress makes it the duty of the consul to do certain acts, then it becomes official by virtue of that obligation; but, so long as it is left entirely voluntary, I see no reason whatever, no justice, no equity, in the claim that what is done voluntarily at some trouble, time, and care on the part of the officer in private business, and not in the business of the Government, no equity that I can see requires that the fee should be returned to the Government.

I think the verdict should be for the defendant on the evidence as I have assumed it, namely, that the acts of the counsel in this case,
97 in the matters embraced in Exhibit 1, were all acts done under State laws, resting for their validity under State laws, and not under any statute of the United States, and having no reference to any business of the United States or to any Federal relations.

Mr. WALKER. If your honor please, I except to the ruling of the court denying my motion to direct a verdict for the Government. I except also to the ruling of the court directing a verdict for the defendant.

I request that the fact may be submitted to the present jury as to what items of Mr. Badeau's account for alleged notarial services between 1870 and 1875 are for services rendered under section 1750 or other sections of the Revised Statutes, and what under various statutes of the several States of the Union.

I make this motion because I understand the court to rule, in granting a motion to direct a verdict for the defendant, that services rendered for matters authorized by the Revised Statutes of the United States are properly official services, as being done by Federal authority. It is clear that a verdict for the defendant would be erroneous except upon proof by the defendant, who has the burden of proof, as to each item of this account that the specific services charged for or claimed were rendered solely by virtue of State statutes.

The COURT. I ruled yesterday that General Badeau, having paid his

money in, is bound to show what items he is entitled to charge as errors in his account rendered. That is undoubtedly so.

I also intend by the present ruling to hold whatever he does by virtue of any authority of the United States is official in its relation to the United States and the fee belongs to the United States; where that element does not exist, that it is not official in its relation to the United States, and the fee belongs to him.

Mr. WALKER. I am entitled to go to the jury on the question that your honor has ruled is a specific question of fact.

98 The COURT. You are, if there is any dispute in the evidence on that point.

Mr. WALKER. It is made a special issue by the ruling of the court, and I am entitled to put in evidence under the favor of the court on that point. This jury is entitled to say whether they believe that statement of Mr. Badeau.

The COURT. So far as I remember the testimony, I don't recall anything which seems to me to present any such contest of fact, or any material inference of fact, that there is any reasonable doubt about it to be submitted to the jury. That is to say, under the testimony of General Badeau, I don't think there is any controversy, or that the jury would be authorized to find as an inference, from any of the evidence in the case, that the items in Exhibit 1 were not done solely in pursuance of State laws, and not dependent for their validity at all upon any United States law. Therefore, I direct a verdict for the defendant and deny the motion of the counsel for the Government.

Mr. WALKER. I ask leave to go to the jury on this specific question.

The COURT. As I recall the testimony, and upon anything that is suggested or stated by counsel as contained in the testimony, I do not perceive that there is anything to be submitted to the jury on that question.

Mr. WALKER. I except to the denial of the motion for leave to go to the jury on that specific question, and I move again that your honor direct a verdict for the Government for the reason that there is no evidence before the court or the jury that within your honor's opinion as now delivered is sufficient to establish the fact that these items for services on Mr. Badeau's account were rendered under the authority of the statutes of the several States of the Union.

Motion denied; counsel for the Government excepts.

99 By direction of the court the jury returned a verdict for the defendant.

And because none of the said exceptions so offered and made to the opinions, rulings, admissions, and exclusions of testimony and decisions of the court appear upon the record of the said trial; therefore, on the prayer of the plaintiff by its counsel, the said judge has assigned and sealed this bill of exceptions this day of , 1887, and directed the same to be filed as and for the 18th day of November, 1886.

It is hereby stipulated and consented that the foregoing be signed and sealed as and for the bill of exceptions herein.

ALEXANDER & GREEN,
Attorneys for Defendant.
STEPHEN A. WALKER,
Attorney for Plaintiff.

100 District court of the United States for the southern district of New York.

UNITED STATES OF AMERICA
vs.
ADAM BADEAU. } Postea.

This action having come duly on for trial before the honorable Addison Brown and a jury on the 18th day of November, 1886, at the rooms of this court, in the United States general post-office building in the city of New York, in said district, and having been then and there tried, and a verdict having been rendered by the jury for the defendant; now, on failure of Alexander & Green, defendant's attorneys, to enter judgment, and on motion of Stephen A. Walker, United States attorney,

It is hereby ordered and adjudged that the defendant have judgment in his favor in this action against the United States of America, the plaintiff.

ADDISON BROWN.

SIRS: Take notice that the foregoing is a copy of a judgment in the above-entitled action entered in the clerk's office of the United States district court, New York City, March 20th, 1887.

STEPHEN A. WALKER,
U. S. Att'y.

To ALEXANDER & GREEN,
Defendant's Attorneys.

101 UNITED STATES OF AMERICA, *ss:*

To Adam Badeau, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be holden at New York City on the first Monday of April, eighteen hundred and eighty-seven, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the southern district of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated March 26th, 1887.

ADDISON BROWN.

102 Circuit court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
ADAM BADEAU, DEFENDANT IN ERROR. } Assignment of errors.

Afterwards, to wit, on the first Monday of April in the same term, before the justice of the said court, at the post-office building, N. Y. City, comes the said plaintiff in error, by Stephen A. Walker, its attorney, and says: That in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in

error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that it, the said plaintiff, may be restored to all things which it has lost by occasion of said judgment, etc.

STEPHEN A. WALKER,
U. S. Atty.

103 Circuit court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
ADAM BADEAU, DEFENDANT IN ERROR.
} Joinder in error.

And afterwards, to wit, on the first Monday of April, in said term, the said defendant in error, by Alexander & Green, his attorneys, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said circuit court, before the justice thereof, now and here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, etc.

ALEXANDER & GREEN,
Attys. for Deft.

It is hereby consented that the within printed record be certified by the clerk of the U. S. dist. court as and for the return to the writ of error in this action nunc pro tunc as of May 20.

Dated New York, May 27, 1887.

ALEXANDER & GREEN,
Deft's Attys., per C.

104 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The honorable William J. Wallace, circuit judge.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ADAM BADEAU, DEFENDANT IN ERROR.
} Cal.—Writs of error. April term, 1887.

Argument on writ of error to the U. S. district court, in the above entitled cause, coming on this day to be heard,

Mr. Stephen A. Walker, United States attorney, is heard in behalf of plaintiff in error;

Mr. Stephen G. Clarke is heard in behalf of defendant in error.

Curia advisari vult.

105 United States circuit court, southern district of New York.

UNITED STATES
vs.
BADEAU.

WALLACE, J.:

This suit was brought in the district court to recover sums of money amounting in the aggregate to $10,572.64 received by the defendant to the use of the plaintiff between July 1, 1870, and September 16, 1881, as consul-general of the United States at London, England.

In the final account rendered by the defendant to the Government in December, 1882, he credited the Government and charged himself with certain moneys in his hands less the sum in controversy, which sum he claimed he was entitled to withhold out of the moneys in his
106 hands, because it represented the amount of fees which he had theretofore erroneously charged against himself in former accounts rendered to the Government.

The issue upon the trial was whether the defendant was entitled to retain these fees, amounting in the aggregate to $10,572.64, as non-official fees, or whether these fees belonged to the Government as official fees. The case for the Government was rested upon the production in evidence of a Treasury transcript of the account of the defendant. The nature of the items charged to the defendant in his account, comprising the sum in controversy, appears in the Treasury transcript; so that upon the face of the account it was shown that the defendant had charged himself
107 with fees received for specified acts or services amounting in the aggregate to $10,572.64, and the only question upon the face of the account was whether these acts or services were official or non-official in their character. The case for the defendant was rested upon his own testimony that the items with which he had originally charged himself, comprising the sum in controversy, were moneys received as fees for the acts and services described and detailed in the account; and upon further testimony tending to show the interpretation and construction of the Department of State in respect to the regulations prescribing the duties of consular officers.

At the close of the evidence each party requested peremptory instructions to the jury, the plaintiff to render a verdict in its favor and
108 the defendant to render a verdict in his favor. The court ruled that the defendant erroneously charged himself originally with the items which comprised the sum in controversy because those items consisted of fees received by him for non-official acts. The counsel for the plaintiff then asked to go to the jury upon the question whether the fees were received by the defendant for non-official acts, but the court instructed the jury to find a verdict for the defendant. The plaintiff has brought this writ of error to review these rulings and other rulings made during the progress of the trial to which the plaintiff took exceptions.

There is no merit in the exceptions to the rulings of the court in admitting evidence. Even if the testimony received should be deemed
109 irrelevant, as the case was not submitted to the jury, the jury were not misled. Neither is there any merit in the exception to

the ruling of the court refusing to submit any question of fact to the jury. There was no conflict of evidence as to what the acts were for which the fees in controversy were received by the defendant.

Whether they were official or non-official was a question of law. The fees were received for taking affidavits, acknowledgments, and authentications for individuals, in transactions which had no relation, directly or remotely, with the official business of the Government. As the law was ruled by the court, if the jury had found against the defendant as to any part of the sum in controversy, it would have been the duty of the court to set aside the verdict as against the weight of evidence.
110 The judge therefore properly declined to submit any question of fact to the jury.

There was no error in the refusal of the court to permit the amendment of the complaint sought by the plaintiff. The motion was addressed to the discretion of the court. The refusal was also a just exercise of discretion, because the complaint fully set out the facts constituting the cause of action, and an amendment allowing a cause of action for money had and received to be turned into one upon an account stated would have merely tended to introduce technicalities and would not have promoted justice.

The real question in the case is whether the defendant was
111 entitled to retain the items with which he originally charged himself, or whether these items were for fees received by him officially and for which he was bound to account to the Government. The district judge, in his disposition of this question upon the trial, assigned reasons for his conclusion that the items represented fees for non-official acts, which are entirely satisfactory to this court, and it is unnecessary to recapitulate or enlarge upon them. It is proper to say, however, that the position taken by the defendant that the fees were for services not required by consular regulations, but were for services of a non-official character, which were his personal emoluments and for which he was not required to account to the Treasury Department, is fully sustained and justified by the interpretation and construction placed by the
112 Department of State upon the meaning of its own regulations and instructions to consular officers. The President was authorized by section 1745 of the Revised Statutes to designate what services of consular officers should "be regarded as official," besides such as are expressly declared by law. The services for which the fees in controversy were charged, if they were official, were so because they had been designated as of that character by the President. The President in the exercise of his executive power under the Constitution acts through the head of the appropriate Executive Department. The heads of Departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts.
113 (Wilcox v. Jackson, 13 Pet., 498, 513; United States v. Allison, 16 Pet., 291, 302; Confiscation Cases, 20 Wall., 102, 109; United States v. Farden, 99 U. S., 10, 19; Woolsey v. Chapman, 101 U. S., 755, 759.)

The regulations of 1870 and 1874 recognize the non-official character of notarial acts and other acts which a consul may do, "not in his quality of an agent of the Federal Government, but simply as a citizen of the United

States, whose local position and character render him available to his fellow-citizens for such services as might have been rendered by private individuals." The interpretation placed upon the regulations by the State Department sufficiently appear in the evidence upon the trial.

114 It was the opinion of that Department, communicated to consular officers during the time the defendant was in office, and uniformly acted upon by that Department, that services like those in controversy were unofficial services. The action of the accounting officers of the Treasury Department in disallowing to the defendant the items with which he had erroneously charged himself seems to have proceeded upon the assumption that they were more competent to determine what acts performed in the State Department, by its subordinate officers under its own regulations, are official and what are non-official than that Department itself. In a difference of opinion upon any such question it is hardly necessary

115 to say that the judgment of the appropriate Executive Department will generally prevail.

The judgment is affirmed.

(Endorsed:) "U. S. circuit court, southern district of New York. The United States vs. Badeau. Opinion. Wallace, J. U. S. circuit court. Filed July 7th, 1887. Timothy Griffith, clerk.

116 At a stated term of the circuit court of the United States, held in and for the southern district of New York, at the post-office building in the city of New York, this 7th day of Sept., 1887.

Present: Hon. William J. Wallace, justice.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
ag'st
ADAM BADEAU, DEFENDANT IN ERROR.

The United States of America, the plaintiff in error in the above-entitled action, having, by writ of error, brought to this court for review the

117 judgment of the United States district court for the southern district of New York, entered herein on the 20th day of March, 1887, in favor of the defendant in error and against the plaintiff in error, and the order denying the motion of the plaintiff in error for a new trial, and the said writ of error having come on to be heard before this court upon the bill of exceptions of the plaintiff in error, and after hearing Stephen A. Walker, esq., of counsel for the plaintiff in error, and Stephen G. Clarke, esq., of counsel for defendant in error:

Now, on motion of Messrs. Alexander & Green, attorneys for the defendant in error, it is ordered that the said judgment and order be, and the same hereby are, in all respects affirmed.

WM. J. WALLACE.

118 (Endorsed:) U. S. circuit court, southern district of New York. The United States of America, plaintiff in error, against Adam Badeau, defendant in error. Order of affirmance. Alexander & Green, att'ys for def't in error. Office & P. O. address, 120 Broadway, New York City, N. Y. U. S. circuit court. Filed Sept. 7th, 1887. Timothy Griffith, clerk.

119 Supreme Court of the United States.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
ADAM BADEAU, DEFENDANT IN ERROR.
} Assignment of errors.

Afterwards, to wit, on the second Monday of October in the same term, before the justices of the said court at the Capitol in Washington, come the said plaintiff in error by Stephen A. Walker, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that they the said plaintiff may be restored to all things which they have lost by occassion of said judgment, &c.

STEPHEN A. WALKER,
U. S. Attorney, Attorney for Plff. in Error.

120 (Indorsed:) United States Supreme Court. The United States, plaintiff in error, vs. Adam Badeau, defendant in error. Assignment of error. Stephen A. Walker, U. S. attorney, attorney for pl'ff in error. U. S. circuit court. Filed Sept. 15, 1887. Tim'y Griffith, clerk.

121 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, DEFENDANT in error,
agt.
ADAM BADEAU, DEFENDANT IN ERROR.
} Joinder in error.

And afterward, to wit, on the 2d Monday of October in the same term, the said defendant in error, by Alexander & Green, his attorneys, come here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid. And he prays that the said Supreme Court of the United States, before the justices thereof now here, may proceed to examine, as well the record and proceedings aforesaid as the matters aforesaid both assigned for error, and that the judgment aforesaid, in form aforesaid given, may in all things be affirmed, &c.

ALEXANDER & GREEN,
Attorneys for Defendant,
Office & P. O. Address, 120 *Broadway, New York City.*

122 (Endorsed:) U. S. Supreme Court. The United States of America, plaintiff in error, against Adam Badeau, defendant in error. Alexander & Green, att'y for def't, office & P. O. address, 120 Broadway, New York City, New York. Due service of a copy of within

joinder in error is hereby admitted. Dated N. Y., Sept. 16, 1887. Stephen A. Walker, U. S. attorney, att'y for pl'ff in error. U. S. circuit court. Filed Oct. 6, 1887. Timothy Griffith, clerk.

123 UNITED STATES OF AMERICA, *ss:*

To Adam Badeau, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Sept. 15, 1887.

E. HENRY LACOMBE,

124 (Indorsed:) U. S. Supreme Court. The United States, plaintiff in error, against Adam Badeau, defendant in error. Citation. Original. Stephen A. Walker, att'y for pl'ff in error. Keep. Service of a copy of the within is admitted this 15th Sept. 1887. Alexander & Green, att'ys for deft.

(Indorsed on cover:) No. 154. The United States, plaintiff in error, vs. Adam Badeau. S. New York, C. C. U. S. Filed October 8, 1887.